125-194

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 194.

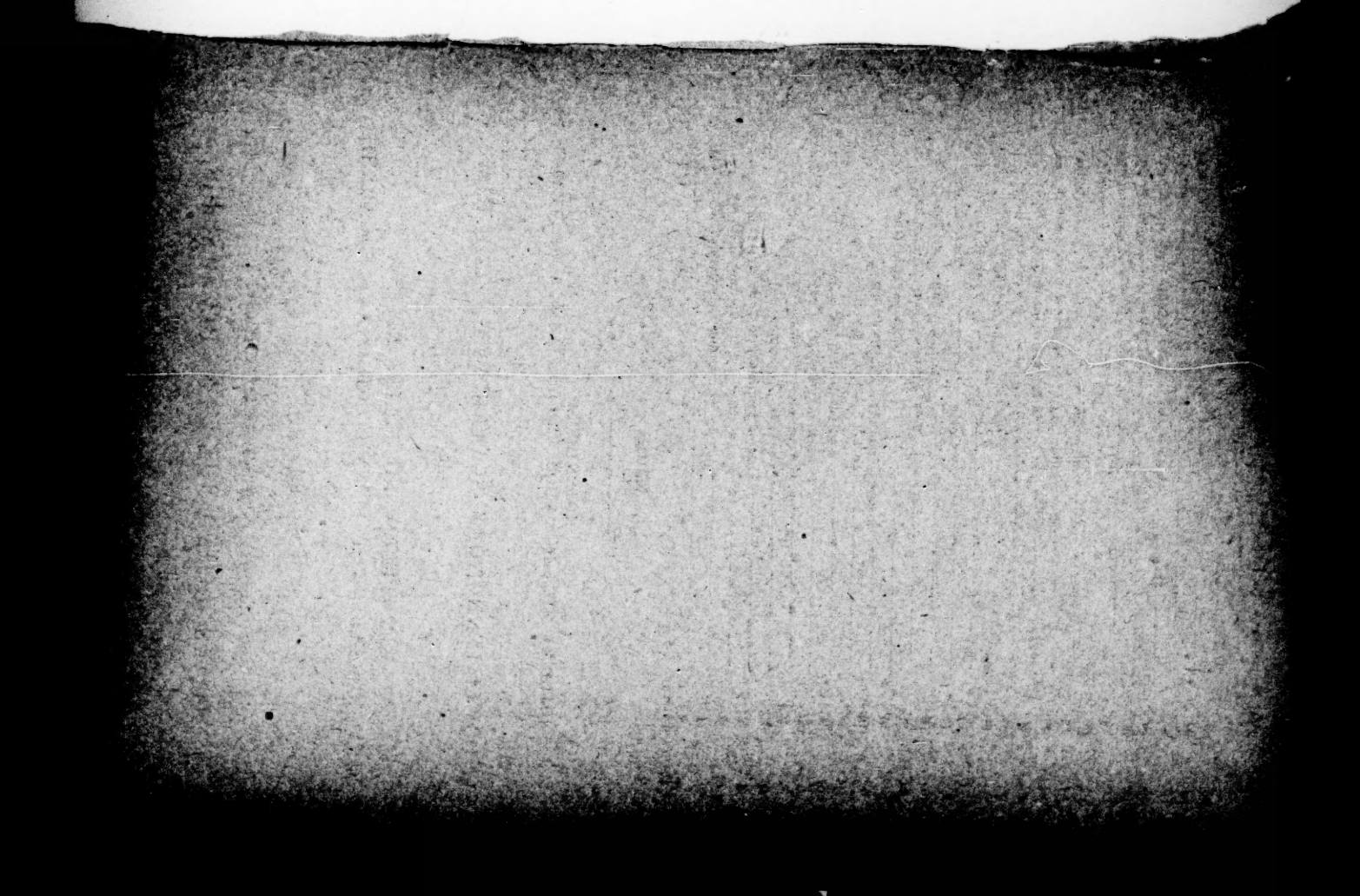
HENRY C. MAYNARD, FRANCIS J. PATTERSON AND MARTIN PATTERSON, APPELLANTS,

vs

W. C. HILL, J. VANCE LEWIS, AND JOHN H. FLAGG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED DECEMBER 19, 1884.



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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Amended complaint	2	1
Exhibit A—Notification of settlers	18	7
B—Affidavit of settlers	22	8
C—Proof of residence and cultivation	24	9
D—Affidavit of witness	25	9
C—Affidavit of witness	26	10
E—Donation	27	10
F—Decision of secretary interior	30	11
Demurrer of defendants	36	13
Demurrer of Hill	38	14
Order sustaining demurrer, &c.	40	15
Appearance	41	15
Power of attorney	41	15
Notice of appeal	44	16
Cost bill	48	18
Clerk's certificate to transcript	49	18
Clerk's certificate as to notice of appeal	50	18
Affidavit as to value	51	19
Opinion	52	19
Submission	59	22
Judgment	60	23
Order allowing appeal	61	23
Bond	63	24
Cost bill	66	25
Clerk's certificate	67	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 2, 1887.

a No. 374.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and Her Husband, MARTIN PATTERSON, *vs.* W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG. } No. 2809.

Received and filed May 21, 1884.

R. G. O'BRIEN, *Clerk.*

1 TERRITORY OF WASHINGTON, *Third Judicial District,* } *ss:*

In the District Court of the Third Judicial District, Holding Terms at Seattle, King County.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and Her Husband, MARTIN PATTERSON, Pl'ff-, *vs.* W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG, Def't-. } No. 2809.

2 *Amended Complaint.*

TERRITORY OF WASHINGTON, *Third Judicial District, County of King,* } *ss:*

In the District Court, Holding Terms at Seattle. In Equity.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and Her Husband, MARTIN PATTERSON, Plaintiffs, *vs.* W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG, Defendants. } No. 2809.

Civil action to recover real estate.

To Honorable Roger S. Greene, judge of the above-entitled district court:

Come now the plaintiffs in the above-entitled action, by C. H. Hanford, their attorney, and, for cause of action against the above-named defendants, by this their amended complaint allege as follows:

I.

3 That in the year 1828, in the State of Vermont, David S. and Lydia A. Maynard, the parents of the plaintiffs, Henry C. Maynard and Frances J. Patterson, were lawfully intermarried, and thereafter lived together as husband and wife until the year 1850.

II.

That said David S. Maynard died intestate in the year 1873, and said Lydia A. Maynard also died intestate in the year 1879; and said plaintiffs, Henry C. Maynard and Frances J. Patterson, are the children and sole heirs of said David S. and Lydia A. Maynard.

III.

That said plaintiff, Frances J. Patterson, is the wife of the plaintiff, Martin Patterson.

IV.

That in the year 1850 said David S. Maynard, with his family, consisting of his said wife and said plaintiffs, Henry C. Maynard and Frances J. Patterson, was dwelling and domiciled in the State of Ohio; that both of said plaintiffs were then infants; and in said year 1850 said David S. Maynard left his said family in said State of Ohio and started overland for California to seek for gold, under a promise made by him to his said wife that he would either return or send for her and said plaintiffs within two years from the time of his said departure, and that in the meantime he would send her means of support; that said David S. Maynard left his said family at said time without means of support and never thereafter contributed in any way towards the support of either his said wife or said plaintiffs.

V.

That on the 16th day of September, 1850, said David S. Maynard commenced his residence in the Territory of Oregon, which then included what is now the Territory of Washington, and continued to reside therein and in the last-named Territory after its organization to the time of his decease.

VI.

That on the 3rd day of April, 1852, said David S. Maynard settled upon and claimed as a married man 640 acres of land in what is now King county, Washington Territory, which tract of land is bounded and described as follows, to wit: "A certain tract of public lands known and designated in the surveys and plats of the United States as the claim No. 43, being parts of sections four, five, six, eight, and nine, in township No. twenty-four north, of range No. 4 east, beginning at a point on the section line between sections eight and nine, distance of 15 chains and forty-five links south of the southwest corner of section four; thence east 28 chains and 25 links; thence north 80 chains; thence west 116.92 chains; thence south 15.65 chains; thence east 9.06 chains; thence east 11.50 chains; thence S. 22° east 5.00 chains; thence S. 55½° E. 21.70 chains; thence S. 41½° E. 11 chains; thence S. 18½° east 5.00 chains; thence south 8.25 chains; thence S. 17¾° E. 5.23 chains; thence S. 15¾° E. 5.00 chains; thence S. 22° E. 9.50 chains; thence south 6.61 chains to the place of beginning, containing six hundred and forty-five and $\frac{38}{100}$ acres," under the act of Congress entitled "An act creating the office of surveyor general of public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 27th, 1850, and resided thereon until the time of his decease.

6 VII.

That on the 22nd day of December, 1852, an act was passed by the Legislative Assembly of the Territory of Oregon; which act is in the words and figures following, to wit:

"An act to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.

SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Oregon, That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are, hereby dissolved.

Passed the house of representatives Dec. 22nd, 1852.

B. F. HARDING,
Speaker of the House of Representatives.

Passed the council Dec. 22nd, 1852.

M. P. DEADY,
President Council."

That no cause at any time existed for such divorce; no notice of any kind was given to said Lydia A. Maynard of any application by said David S. Maynard for a divorce or of the introduc-
7 tion or pendency of the bill for said act in the said Legislative Assembly of the Territory of Oregon, nor did said Lydia A. Maynard have any knowledge of the passage of said act until the month of July, 1853, and at the time of the passage of said act said Lydia A. Maynard was not within the limits or an inhabitant of Oregon, and she never became a resident of either the Territory or State of Oregon, and she never in any manner acquiesced in or consented to said act, and the said Legislative Assembly had no authority to pass said act, and the same is and at all times has been absolutely void, and said David S. Maynard and Lydia A. Maynard never were lawfully divorced.

VIII.

That on or about the 15th day of January, 1853, said David S. Maynard entered into a pretended marriage with one Catherine T. Brashears, and thereafter lived and cohabited with her until the time of his death, but without issue.

IX.

That on the 7th day of November, 1853, said David S. Maynard filed with the surveyor general of Oregon his notification
8 No. 407, under the said act of Congress of September 27th, 1850, as amended by the act of Congress, approved the 14th day of February, 1853, and with said notification said David S. Maynard filed his own affidavit, alleging his residence in Oregon from the 16th of September, 1850, and residence on said land from the 3rd day of April, 1852, and that he was married to said Lydia A. Maynard until the 24th day of December, 1852, and that he was

legally married to her on the 28th day of August, 1828, in Rutland county, in the State of Vermont, and said notification was also accompanied by the affidavits of Luther M. Collins and Jacob Maple, alleging that said David S. Maynard did, within the knowledge of said affiants, personally reside upon and cultivate the land described in his said notification from the said 3rd day of April, 1853.

That certified copies of said notification and affidavits are hereunto annexed and are marked Exhibits "A," "B," "C," and "D," and the same are hereby referred to for greater certainty, and
9 by such reference the same are hereby made a part of this complaint.

X.

That by virtue of an act of Congress, approved the 17th day of July, 1854, entitled "An act to amend an act approved September twenty-seventh, eighteen hundred and fifty, to create the office of surveyor general of the public land in Oregon, &c., and also the act amendatory thereof, approved February fourteen, eighteen hundred and fifty-three," the offices of register and receiver for Washington Territory were created, and such officers were duly appointed pursuant to said act and prior to the 30th day of April, 1856, and their offices were duly established at Olympia, in Washington Territory; and said register and receiver were, on said 30th day of April, 1856, and at all times since said last-mentioned date, duly authorized to take the proofs required and to issue certificates as provided by section seven of said act of the twenty-seventh of September, 1850.

XI.

That on the 30th day of April, 1856, said David S. Maynard made proof before said register and receiver of his residence
10 upon and cultivation of his said claim, to wit, the tract of land described in paragraph VI of this amended complaint from the 3rd of April, 1852, to and including the 3rd of April, 1856; and on the 14th of May, 1869, said register and receiver issued donation certificate No. 440 to said David S. Maynard and to said Catherine T. Maynard, as his wife, for said claim, and apportioned the west half of said claim to said David and the east half thereof to said Catherine; and on the 21st of July, 1873, the Commissioner of the General Land Office annulled said certificate as to said Catherine, on the ground that, as it then appeared and was supposed that said Lydia A. Maynard was dead, her heirs were, in the opinion of said Commissioner, entitled to the wife's half of said claim.

XII.

That on the 8th of April, 1872, after a full hearing before said register and receiver, at which said Lydia A. Maynard appeared in person, said register and receiver duly issued donation cer-
11 tificate No. 440 to said David S. Maynard for the west half and to said Lydia A. Maynard for the east half of said land hereinbefore described.

XIII.

That an appeal was taken from the said decision of said register and receiver in awarding the east half of said land to said Lydia A. Maynard to the Commissioner of the General Land Office, and an appeal was also taken from the decision of said Commissioner to the Secretary of the Interior, and a final decision was rendered thereon by said Secretary on the 1st day of March, 1873; that in said final decision of said Secretary the facts are found to be and are stated as follows: "On the 26th of October, 1853, the said Maynard made his notification No. 407 as a married man for a donation claim containing 640 acres in Oregon, under the act of Sept. 27th, 1850, as amended by the act of February 14, 1853.

He was married to Lydia A. Maynard in 1828, in the State of Vermont. He subsequently removed with his wife to the State of Ohio and went thence to the Territory of Oregon, leaving
12 his wife in Ohio. September 16th, 1850, he took up his residence in Oregon, and April 3d, 1852, settled upon and commenced cultivation of the tract in controversy.

December 24th, 1852, he was divorced by an act of the Territorial Legislature of Oregon. January 15th, 1853, he intermarried with Catherine T. Maynard, his present wife, who lived with him on the premises until after the expiration of the four years of settlement and cultivation.

It is satisfactorily shown that Maynard has fully complied with all the requirements of the law relating to settlement and cultivation. The register and receiver, April 8th, 1872, issued a donation certificate, which gave the west half of the tract to David S. Maynard and the east half to his first wife, Lydia;" and said Secretary, by said final decision, affirmed the said decision of said register and receiver in awarding the west half of said tract to said David S. Maynard, and a patent was thereupon duly issued to said David S. Maynard for said west half of said tract, but said Secretary, by his said final decision, erroneously
13 reversed the said decision of said register and receiver as to said Lydia Maynard and as to the east half of said tract, and said Secretary and the Commissioner of the General Land Office thereafter erroneously caused the word "cancelled" to be written across the face of said donation certificate No. 407, and erroneously refused to issue a patent to said Lydia A. Maynard for said east half of said tract, and erroneously attempted to restore said east half of said tract to the public domain; that duly certified transcripts of said donation certificate No. 407 and of said final decision of said Secretary are hereunto annexed and are marked Exhibits "E" and "F," and the same are hereby referred to for greater certainty, and by such reference the same are hereby made a part of this complaint.

XIV.

That the said donation certificate No. 407 was lawfully issued to said David S. Maynard and Lydia A. Maynard, and the action of said Secretary and of the Commissioner of the General Land Office

in refusing to issue a patent to said Lydia A. Maynard for
14 the east half of said tract and in causing the word "cancelled" to be written upon the face of said donation certificate was illegal and in contravention of the rights of said Lydia A. Maynard; that said erroneous and illegal action arose from a misconstruction and misapplication of the law by said Secretary, in this, that said Secretary, by his said decision, held that the *vinculum* of the said marriage between said David S. Maynard and Lydia A. Maynard was severed by said act of the Territorial Legislature of Oregon, whereas said act is void, because said Legislature had no power to so enact, and in this, that said Secretary, by his said decision, held that said Lydia A. Maynard never acquired or had any greater rights in or to said land than her said husband had at the time of the passage of said act of said Territorial Legislature, whereas by virtue of the provisions of said act of Congress of September 27th, 1850, and the acts amendatory thereof, and by compliance with the provisions thereof on the part of said David S. Maynard, the said Lydia A. Maynard became fully entitled to one-half of said tract of 640 acres.

15 XV.

That in the year 1861 the public lands in said township twenty-four north, of range four east, were surveyed and platted under the direction of the Commissioner of the General Land Office of the United States, and the whole of the said tract of 640 acres described in paragraph VI of this amended complaint is exhibited on said plats as Maynard's Donation Claim.

XVI.

That in the year 1880 the defendants, W. C. Hill and J. Vance Lewis, with full knowledge of the rights of said Lydia A. Maynard and of her heirs, located the whole of said east half of said tract described in paragraph VI of this amended complaint with certain land scrip known as Porterfield scrip, and on the 9th day of January, 1882, patents were issued to said defendants for certain portions of said east half of said tract as follows, to wit: One patent for lots 9 and 10 of section 4 and one patent — lot 13 of section 4 and one patent for lot 14 of section 4 and one patent for lots 6 and 7 of section 5 and one patent for lots 8 and 9 of section 5, all in said
16 township twenty-four north, of range four east, and all in said east half of said tract of 640 acres; that the said lands so patented to said defendants are of the value of at least ten thousand dollars.

XVII.

That said defendants are applicants for patents to the remaining portions of said east half of said tract.

XVIII.

That said defendant, John H. Flagg, claims to have some interest in said lands and in said scrip located upon the same as aforesaid, but the particular nature or extent of said claim is unknown to plaintiffs.

XIX.

That said plaintiffs, Henry C. Maynard and Frances J. Patterson, are the equitable owners of the lands patented to said defendants, Hill and Lewis, as aforesaid.

And said defendants are equitably trustees of the legal title to said lands for said plaintiffs.

Wherefore plaintiffs pray that said defendants may be decreed by this court to be such trustees, and that said defendants be ordered by the decree herein to convey said lands, by a good and
17 sufficient deed, to said plaintiffs by a day certain, and that in default thereof said lands be conveyed to plaintiffs by a commissioner to be appointed by this court for that purpose, and for costs and disbursements and such other and further relief in the premises as to the court shall seem meet and equitable.

C. H. HANFORD,
Attorney for Plaintiffs.

TERRITORY OF WASHINGTON, }
County of King, } *ss:*

I, C. H. Hanford, being first duly sworn, depose and say that I am the attorney for the plaintiff- in the above-entitled action; that I have read the foregoing complaint, know the contents thereof, and believe the same to be true, and that affiant makes this affidavit for said plaintiffs for the reason that said plaintiffs are not now in King county.

C. H. HANFORD.

Subscribed and sworn to before me this 5th day of March, 1883.

FRED. E. SANDER,
Notary Public.

18 D. W. D. S. D. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 12, 1881.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of notification No. 407 of D. S. Maynard, copy of affidavits, dated Oct. 26, 1853, of D. S. Maynard, Luther M. Collins, and Jacob Maple, and copy of donation certificate No. 440, dated April 9, 1872, in favor of D. S. Maynard and Lydia A. Maynard, are true and literal exemplifications of the originals as they appear on file in this office.

In testimony whereof I have hereunto subscribed my name
19 and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. Gen'l Land Office.]

N. C. McFARLAND,
Commissioner of General Land Office.

20 No. 407.

Notification to the Surveyor General of Oregon of Settlement on Public Land not yet Surveyed.

TERRITORY OF WASHINGTON:

Pursuant to the act of Congress, approved on the 14th day of February, 1853, entitled "An act to amend an act entitled 'An act to create the office of surveyor general of the public lands in Oregon, and to provide for the survey and make donations to settlers of the said public lands,'" I, D. S. Maynard, a married settler of King county, in that part of the Territory of Oregon now established as the Territory of Washington, hereby give notice of my claim to a donation of 640 acres of land, particularly bounded and described as follows: Beginning at the southwest corner of the land claimed by H. L. Yesler, upon which stands his steam saw-mill, running thence in a southerly direction along the coast of Dewamps Bay to the northwest corner of the land claimed by John Holgate (a distance sufficient to make one mile due north & south); thence east a distance sufficient to encompass one section of land; thence due north
21 one mile; thence west to the place of beginning.

D. S. MAYNARD.

P. S. The reason the above claim has not been surveyed is in consequence of being disappointed by the surveyor.

D. S. MAYNARD.

Exhibit A.

The surveyor general advises settlers to survey their claims, establish their corners, and plainly mark their lines to secure the full quantity of land allowed by law and prevent a conflict of boundaries; also to transmit their surveys and plats with their notifications.

22 No. 407.

Affidavit of Settlers on Unsurveyed Lands Claiming under the 4th Section of Act of 27th September, 1850.

D. S. Maynard, of King county, in the Territory of Washington, being first duly sworn, says that he is a white settler on the public lands in that part of Oregon now established as the Territory of Washington, and that he arrived in Oregon on the 16th day of September, 1850, and was a resident thereof on and before the 1st day of December, 1850; that he is a married man & a free-born citizen of the United States & a permanent settler in Washington

Territory, and that he was born in Rutland county, State of Vermont, in the year 1808; that he has personally resided upon and cultivated that part of the public land in that part of Oregon now established as the Territory of Washington particularly described in the annexed notification to the surveyor general of Oregon continuously from the 3rd day of April, 1852, to the 26th day of October, 1853.

And he further says that he was intermarried with Lydia A. Bickey, his first wife, until Dec. 24th, 1852, and that he was
23 legally married to — on the 28th of August, 1828, in Rutland county, Vermont, and that he is intermarried with Catherine T. Brashears, his second wife, and that he was legally married to her on the 15th day of January, 1853, in Thurston county, in (now) Washington Terr'y.

D. S. MAYNARD.

Subscribed and sworn to before me this 26th day of October, 1853, in Seattle, K. C., W. T.

HENRY L. YESLER,
Clerk of the Probate Court.

Exhibit B.

24 No. 407.

Proof of Commencement of Residence and Cultivation on Land not yet Surveyed.

L. M. Collins, of King county, in the Territory of Washington, being first duly sworn, says that he is in no way interested in the tract of land claimed as a donation by D. S. Maynard and particularly described in the annexed notification to the surveyor general of Oregon; that he is personally acquainted with said D. S. Maynard, and knows that he has personally resided upon and cultivated said tract of land continuously from the 3rd day of April, 1852, to the 26th day of October, 1853.

LUTHER M. COLLINS.

Subscribed and sworn to before me this 26th day of October, 1853, in Seattle, K. C., W. T.

HENRY L. YESLER,
Clerk of the Probate Court.

Exhibit C.

25 No. 407.

Jacob Maples, of King county, in the Territory of Washington, being first duly sworn, says that he is in no way interested in the tract of land claimed as a donation right by D. S. Maynard and particularly described in the annexed notification to the surveyor general of Oregon; that he is personally acquainted with said D. S. Maynard, and knows that he has personally resided upon and cultivated said tract of land continuously from the 3rd day of April, 1852, to the 26th day of October, 1853.

JACOB MAPEL.

Subscribed and sworn to before me this 26th day of October, 1853, in Seattle, K. C., W. T.

HENRY L. YESLER,
Clerk of the Probate Court.

Exhibit D.

26 No. 407.

Affidavit of Witness for a Settler Claiming Unsurveyed Lands as a Married Man.

—— ——, of King county, in the Territory of Washington, being first duly sworn, says that he is personally acquainted with D. S. Maynard, the person who claims a donation right to the tract of land described in the annexed notification to the surveyor general of Oregon, and Catherine T. Maynard, his wife; that he has known them to live together as man and wife from the 20th day of January, 1853, to the 26th day of October, 1853, and that they are and were reputed by their neighbors as such during said period.

And, further, that he was known & reputed as being a married man with his first wife up to the 24 of December, 1852.

LUTHER M. COLLINS,

Subscribed and sworn to before me this 26th day of October, 1853, in Seattle, K. C., W. T.

HENRY L. YESTER,
Clerk of the Probate Court.

Exhibit C.

[Endorsed:] Washington Territory. Notification of settlers on unsurveyed lands. No. 444. Dated ——, 185–. Filed 7th November, 1853.

27 *Donation.*

Certificate No. 440. Notification No. 407.

Whereas, in conformity with provisions of the 7th section of the act of Congress, approved September 27, 1850, entitled "An act to create the office of surveyor general of the public lands in Oregon and to provide for the survey and to make donations to settlers of the public lands," and the amendment thereto, D. S. Maynard and Lydia A. Maynard, wife of the said D. S. Maynard, of the county of King, in *the* Washington *of* Territory, claiming a donation right, in virtue of the act aforesaid, to a certain tract of public lands known and designated in the surveys and plats of the United States as the claim No. 43, being part of sections four, five, six, eight, and nine, in township No. twenty-four north, of range No. four east, beginning at a point on the section line between sections eight and nine, distance of 15 chains and 45 links south of the southwest corner of section four; thence east 28 chains and 25 links; thence north 80 chains; thence west 116.92 chains; thence south 15.65 chains; thence east

9.06 chains; thence east 11.50 chains; thence S. 22° east
28 5.00 chains; thence S. 55½° E. 21.70 chains; thence S. 41½° E. 11 chains; thence S. 18½° east 5.00 chains; thence south 8.25 chains; thence S. 17¾° E. 5.23 chains; thence S. 15¾° E. 5.00 chains; thence S. 22° E. 9.50 chains; thence south 6.61 chains to the place of beginning, containing six hundred forty-five $\frac{38}{100}$ acres, having proven to the satisfaction of the register and receiver of Olympia, W. T., the fact that such settlement was commenced on the 3rd April, 1852, to 30th April, 1856, four years prior to the date hereof; and having, in pursuance of the requirements of the 7th section of the act aforesaid, established by two disinterested witnesses the fact of continued residence and cultivation by the said act:

Now, therefore, be it known that we, J. P. Clark and Robert R. Stuart, register and receiver of public lands in said Territory, do hereby, and pursuant to the 7th section of the act aforesaid, certify to the Commissioner of the General Land Office the facts aforesaid, accompanied by the evidence thereof, in order that a patent may be issued to said claimant-, D. S. Maynard — Lydia A. Maynard, for the tract of land described, as required by the 7th section of the act aforesaid—west half of said claim is assigned to the husband, D. S. Maynard, and the east half is assigned to the wife, Lydia A.
29 Maynard—Provided, That the said Commissioner shall find no valid objection thereto.

Given under our hands, at the land office at Olympia, W. T., this 9th day of April, 1872.

J. P. CLARK, *Register.*
ROBERT G. STUART, *Receiver.*

Exhibit E.

[Written across face in red ink:] Canceled. See decision of Gen. Land Office Aug. 12, 1872, as affirmed by the Secretary of the Interior March 1st, 1873.

30 D. W. D. S.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 12, 1881.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy, dated March 1, 1873, is a true and literal exemplification of the original decision of C. Delano, Secretary of the Interior, in the matter of the contested donation claim of D. S. Maynard and wife, as it appears on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. Gen'l Land Office.]

N. C. McFARLAND,
Commissioner of General Land Office.

31 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 1st*, 1873.

SIR: I have carefully examined the contested donation claim of David S. Maynard and wife, certificate No. 440, on appeal from your decision of the 12th of August last. I find the facts to be as follows: On the 26th of October, 1853, the said Maynard made his notification No. 407, as a married man, for a donation claim containing 640 acres in Oregon under the act of Sept. 27th, 1850, as amended by the act of February 14, 1853. He was married to Lydia A. Maynard in 1828 in the State of Vermont. He subsequently removed with his wife to the State of Ohio and went thence to the Territory of Oregon, leaving his wife in Ohio. September 16, 1850, he took up his residence in Oregon, and April 3rd, 1852, settled upon and commenced cultivation of the tract in controversy. December 24th, 1852, he was divorced by an act of the Territorial Legislature of Oregon. January 15, 1853, he intermarried with Catherine T. Maynard, his present wife, who lived with him on the premises until after the expiration of the four years of settlement and culti-
32 vation. It is satisfactorily shown that Maynard has fully complied with all the requirements of the law relating to settlement and cultivation. The register and receiver, April 8th, 1872, issued a donation certificate which gave the west half of the tract to David S. Maynard and the east half to his wife, Lydia.

You awarded the west half to David and refused to award the east half to either the first or second wife.

I am of opinion that your decision should be affirmed.

Lydia A. Maynard was never on the land. She can only claim by virtue of being the wife of David, and she can claim no greater rights than he possessed at the time of the divorce. The divorce, says Bishop, "snaps the vinculum of the marriage; whatever hangs upon it falls. Thus, if the man dies the woman will not be his widow nor entitled as such to dower and a portion of his personal property. He will not on her death be authorized to hold her lands as tenant by the courtesy, but, on the contrary, his interest and that of his grantees and representatives in them and in her
33 choses in action ceases immediately." Bishop, M. & D., 693; Leavins *vs.* Sleator, 2 Green (Ia.), 604; Starr *vs.* Pease, 8 Conn., 541; Townsend *vs.* Griffin, 4 Harring Del., 440.

If, therefore, the estate of David had not vested at the time of the divorce it is clear that the wife has no title now. I think the estate had not then vested. The interest of the husband was inchoate and depended upon his future compliance with the conditions prescribed by the statute. If he should fully comply title would vest; otherwise it would not. The conditions were conditions precedent and had not then been complied with. It is argued that the act of Sept. 27, 1850, made a present grant, and therefore the fee was in the husband, subject to be defeated by his non-compliance with the condition subsequent of four years cultivation. At the date of the act Maynard was not in possession. He did not make his settlement until more than five months after the passage of the act He had not even initiated a right. The condition of cultivation is not, in

my opinion, a subsequent but a precedent one, and not having been complied with at the time of the divorce the interest of Lydia in the premises was terminated by the dissolution of her mar-
34 riage contract with David. Catherine, the second wife, is not entitled, because she was not the wife of the applicant on the 1st day of December, 1850, or within one year from that date. The act was evidently intended to limit the additional three hundred and twenty acres to cases where the person was married at the date of the act or should become married before the 1st of December, 1851. It says: "And if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section or six hundred and forty acres, one-half to himself and the other half to his wife, to be held by her in her own right."

I affirm your decision and herewith return the papers.

Very respectfully, C. DELANO, *Secretary.*

Hon. Th. Drummond, Com'r G. L. Office.

Exhibit F.

And upon the back of said amended complaint are en-
35 dorsed the words, letters, and figures following, to wit:

No. 2809. Henry C. Maynard *et al. vs.* W. C. Hill *et al.* Amended complaint. Filed March 8th, 1883. James Seavey, clerk, by James P. Ludlow, deputy clerk. C. H. Hanford.

36 In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at Seattle for the Counties of King and Kitsap.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and Her Husband, MARTIN PATTERSON, Plaintiffs,
vs.
W. C. HILL, J. VANCE LEWIS, and JOHN N. FLAGG, Defendants.
} No. 2809.

Come now the above-named defendants, by their attorney, P. P. Carroll, and demur to the amended complaint of the above-named plaintiffs; and defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true, for cause of demurrer alleges—

1. That the court has no jurisdiction of the person of defendants.
2. That the complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray whether they shall be com-
37 pelled to make any answer to said bill of complaint, and defendants pray to be hence dismissed with their costs and disbursements made in this behalf.

P. P. CARROLL,
Att'y for Def'ts.

And upon the back of said demurrer to complaint are endorsed the words, letters, and figures following, to wit:

2809. In the district court at Seattle. Henry C. Maynard *et al. vs.* W. C. Hill *et al.* Demurrer to complaint. Filed March 30, 1883. James Seavey, clerk, by James P. Ludlow, deputy clerk. P. P. Carroll, att'y for def'ts.

38 *Demurrer to Amended Complaint.*

TERRITORY OF WASHINGTON,
Third Judicial District, County of King:

In the District Court, Holding Terms at Seattle. In Equity.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and MARTIN PATTERSON, Her Husband, Plaintiffs,
vs.
W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG, Defendants.
} No. 2809.

Civil action to recover real estate.

Now comes the defendants, William C. Hill, impleaded as W. C. Hill, and J. Vance Lewis, *in propriæ personæ*, and demur to plaintiffs' amended complaint on file herein on the ground that the said amended complaint does not state facts sufficient to constitute a cause of action.

WILLIAM C. HILL, *P. P.*
J. VANCE LEWIS, *P. P.*

JAMES K. REDINGTON,
Of Counsel for Defendants.

DISTRICT OF COLUMBIA, *County of Washington:*

I, William C. Hill, being first duly sworn, deposes and say that I am the defendant in the above-entitled cause, impleaded as
39 W. C. Hill; that the signature to the foregoing demurrer is my genuine signature; that the signature of J. Vance Lewis, also signed thereto, is the genuine signature of the defendant so impleaded, and that said demurrer is not filed for the purpose of delay, but is well founded in law, as we are advised by counsel.

W. C. HILL.

Subscribed and sworn to before me this 26th day of March, 1883.

R. J. MEIGS,
Clerk Supreme Court of the District of Columbia.
By R. J. MEIGS,
Ass't Clerk.

And upon the back of said demurrer to amended complaint are endorsed the words, letters, and figures following, to wit: Territory of Washington, 3d judicial district, county of King. No. 2809. In dist. court, holding terms at Seattle. Henry C. Maynard *et al. vs.* William C. Hill *et al.* In equity. No. 2809. Civil action to recover

real estate. Demurrer of defendants to amended bill *on* complaint Filed April 12th, 1883. James Seavey, clerk, by James P. Ludlow, deputy clerk.

40 *Journal Entry. Journal G, Page* 281.

HENRY C. MAYNARD *et al.* *vs.* W. C. HILL *et al.* } 2809.

APRIL 19TH, 1883.

This cause, by consent of counsel, coming on to be heard this day on the demurrer to the complaint, and the court after hearing P. P. Carroll, attorney for defendants, and C. H. Hanford, attorney for plaintiffs, and being fully advised of the law in the premises, it is further considered, ordered, adjudged, and decreed that there be judgment on said demurrer in favor of said defendants and against said plaintiffs, and that defendants do have and recover of plaintiffs their costs herein, and that execution issue therefor.

41 TERRITORY OF WASHINGTON, *County of King,* } *ss*:

In the District Court for the Third District, at the April Term thereof, A. D. 1883.

HENRY C. MAYNARD *et al.* *vs.* W. C. HILL *et al.* } No. 2809.

By leave of the court first had and obtained I hereby appear in above-entitled cause as attorney for defendants.

April 24, 1883.

FELIX BRANNIGAN.
Att'y for W. C. Hill et al.

Power of Attorney.

Know all men by these presents that I, William C. Hill, of Washton city, in the Dist. of Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Felix Brannigan my true and lawful attorney, irrevocable, for me and in my name, place, and stead, hereby annulling and revoking all former powers of attorney or authorizations whatever in the premises, to appear for me in the case of Henry C. Maynard *et al. vs.* W. C. Hill *et al.*, equity No. 2809, civil action to recover
42 real estate, now pending in the district court for 3rd judicial district, holding terms at Seattle, in the county of King, in the Territory of Washington, and take general charge thereof in said court and all appellate courts of said Territory, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present at the doing

thereof, with full power of substitution and revocation, hereby satisfying and confirming all that my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof.

In witness whereof I hereunto set my hand and seal this 28th day of March, eighteen hundred and eighty-three

W. C. HILL. [SEAL.]

JAMES K. REDINGTON.
GEO. F. GRAHAM.

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Be it known that on this 28th day of March, in the year
43 eighteen hundred and 83, before me, the undersigned, a notary public in and for said county and District, personally appeared William C. Hill, to me well known to be the identical person who executed the foregoing letter of attorney, and, the same having been first fully read over to him and the contents thereof duly explained, acknowledged the same to be his act and deed.

In testimony whereof I have hereunto set my hand and affixed my seal of office the day and year last above written.

[NOTARIAL SEAL.] GEO. F. GRAHAM,
Notary Public.

If not acknowledged before an officer having an official seal his official character must be attested by the certificate of the clerk of a court of record of the proper county, under his seal of office, which certificate must be so attached as that the imprint of the seal may appear on this paper. No revenue stamp required.

And upon the back of said power of attorney are endorsed the words, letters, and figures following, to wit:

Power of attorney. Wm. C. Hill to Felix Brannigan. Filed April 24th, 1883. James Seavey, clerk, by James P. Ludlow, deputy clerk.

44 *Notice of Appeal.*

TERRITORY OF WASHINGTON, *Third Judicial District, County of King,* } *ss:*

In the District Court, Holding Terms at Seattle.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and Her Husband, MARTIN C. PATTERSON, Plaintiffs,
vs.
W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG, Defendants. } No. 2809.

To W. C. Hill, J. Vance Lewis, and John H. Flagg, defendants:

Please take notice that the plaintiffs in the above-entitled action do hereby take an appeal to the supreme court of the Territory of Washington from the final judgment rendered in the above-entitled district court in said action, the same being a judgment in favor of

the defendants and against the plaintiffs in said action, upon the demurrer of said defendants to the plaintiffs amended complaint, and that said defendants do have and recover of and from said plaintiffs their cost in said action; which judgment was rendered by said district court on the 19th day of April, 1883, and is entered of record on page 281 of Journal G of the records of said
45 district court, and that said appeal will be prosecuted at the next regular term of said supreme court.

The following is a particular description of every decision of every ruling, order, and decree by which the appellants claim to have been aggrieved, and which they rely upon as ground for the reversal of said judgment, viz:

1. The decision and ruling of said district court, on the 19th day of April, 1883, sustaining the demurrer to said plaintiffs' complaint in said action, and the failure of the court to overrule said demurrer.

2. The judgment of said district court in favor of the defendants upon said demurrer, to wit, the final judgment in said action hereinbefore referred to, and the failure of the court to grant plaintiffs the relief prayed for in their said amended complaint.

The clerk of said district court will forthwith make and transmit to the clerk of said supreme court a perfect transcript of the record in said action, containing the following records and papers, to wit:

1st. The amended complaint in said action, with each of the exhibits annexed thereto.

2d. Each of the several demurrers filed by the defendants in said action.

46 3d. The notice of appearance filed by Felix Brannigan, attorney for the defendants.

4th. The power of attorney filed by said attorney for the defendants.

5th. The judgment of the court in said cause, entered on page 281 of Journal G.

6th. This notice of appeal, with proof of service thereof and all endorsements thereon.

C. H. HANFORD,
Attorney for Plaintiffs.

TERRITORY OF WASHINGTON, } ss:
County of Thurston, }

I, William Billings, sheriff of Thurston county, Washington Territory, do hereby certify that I personally served the foregoing notice of appeal upon P. P. Carrol, attorney for the defendants in the action named in said notice, at Olympia, in said Thurston county, on the 20th day of September, 1883, by then and there delivering a true copy of said notice, certified to be such by the clerk of the district court, holding terms at Seattle, to said Carroll personally.

WILLIAM BILLINGS,
Sheriff of Thurston Co., W. T'y.
By R. P. SHOECRAFT, *Deputy.*

47 Received, at Seattle, in King county, Washington Territory, this 19th day of September, 1883, a true copy of the foregoing notice of appeal, and all further service of said notice hereby waived.

FELIX BRANNIGAN,
Attorneys for Defendants.

And upon the back of said notice of appeal are endorsed the words, letters, and figures following, to wit:

No. 2809. In the district court, third judicial district, holding terms at Seattle. Henry C. Maynard *et al.*, plaintiffs, *vs.* W. C. Hill *et al.*, defendants. Notice of appeal. Filed September 17, 1883. James Seavey, clerk. C. H. Hanford, attorney for plaintiffs. Court seal.

48 *Cost of Bill.*

	Dr.	Cr.
Fees clerk of district court	10 95	10 95
Sheriff district court, J. McGraw	70	
Seattle Weekly Chronicle	16 00	16 00
Clerk's costs on appeal	3 40	3 40
" " transcript to S. c't	15 80	15 80
Paid by pl'ff-:		
Clerk on ac. of fees	10 95	
Seattle Weekly Chron'c'e	16 00	
Costs on appeal	3 40	
Fees on transcript	15 80	
	46 85	46 15

49 TERRITORY OF WASHINGTON,
Third Judicial District, County of King:

I, James Seavey, clerk of the district court of the third judicial district of Washington Territory, holding terms at Seattle, King county, for the counties of King and Kitsap, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of said district court this 16th day of May, A. D. 1884.

[Seal of U. S. District Court, 3d Judicial Dist.]

JAMES SEAVEY, *Clerk*,
By JAMES P. LUDLOW,
Deputy Clerk.

50 TERRITORY OF WASHINGTON,
Third Judicial District, County of King:

I, James Seavey, clerk of the district court of the third judicial district of Washington Territory, holding terms at Seattle, King county, for the counties of King and Kitsap, do hereby certify that the notice of appeal, of which a perfect exemplification appears on pages 49, 50, 51, 52 of this transcript, was filed in the office of the

clerk of this court, and with the papers in said cause No. 2809, by James Seavey, clerk of this court, in person on the 17th day of September, A. D. 1883, and that the endorsement of filing upon said notice of appeal is authenticated by the genuine signature of said James Seavey, clerk as aforesaid, and the seal of this court.

In testimony whereof I have hereunto set my hand and the seal of said district court this 16 day of May, A. D. 1884.

[Seal of the U. S. District Court, 3d Jud'l Dist.]

JAMES SEAVEY, *Clerk*,
By JAMES P. LUDLOW, *Deputy*,

51 *Affidavit.*

TERRITORY OF WASHINGTON, } ss:
County of King, }

In the Supreme Court of Washington Territory. July Term, 1884.

HENRY C. MAYNARD, FRANCES J. PATTERSON and Her Husband, MARTIN PATTERSON, Appellants,

vs.

W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG, Appellees.

C. H. Hanford, being first duly sworn, deposes and says that he is attorney for the appellants in the above-entitled cause; that he is personally well acquainted with the land described in the plaintiffs' complaint, which land is the subject of controversy in this action, and knows the value thereof; that the value of said land is at least ten thousand dollars, and at the time of the commencement of this action said land was and is now of greater value than five thousand dollars.

C. H. HANFORD.

Subscribed and sworn to before me this 20th day of September, A. D. 1884.

[NOTARIAL SEAL.] A. E. HANFORD,
Notary Public.

52 *Opinion.*

In the Supreme Court of the Territory of Washington.

HENRY C. MAYNARD *et al.* }
vs. } # 374.
W. C. HILL *et al.* }

The court below sustained a demurrer to the complaint filed in this action and rendered judgment in favor of defendants, from which judgment plaintiffs appealed and have brought the case here for review.

Upon the facts stated in the complaint plaintiffs were entitled to recover the lands in controversy, unless the special act of the Legislature of the Territory of Oregon, declaring the bonds of matrimony between David S. Maynard and Lydia A. Maynard to be dissolved,

has had the effect to deprive her of the benefits she would otherwise have been entitled to under the donation law of the United States. The case, therefore, involves two questions, viz:

First. Was said act of the Legislature valid for any purpose? and,

53 Second. If void, did it affect the rights of the divorced wife under said donation law?

The first enquiry, then, is as to the power of said Legislature to pass a special act of divorce, for this power being cancelled the fact that it did pass such an act will raise a conclusive presumption that it was rightfully passed and that just cause therefor was shown to the satisfaction of the said Legislature, and therefore the allegation of the complaint that no such cause in fact existed is simply a conclusion of law inconsistent with the facts stated in the complaint and cannot avail plaintiffs.

Had such Legislature the power to pass such special act?

If it had the power to dissolve the bonds of matrimony at all it could do so by special act, as from the nature of the legislation it must be special and not general.

The said Legislature is given full power (subject to certain restrictions not pertinent to this discussion) to legislate upon all rightful subjects not inconsistent with the Constitution and laws of the United States.

We will first enquire as to whether such a law was upon a rightful subject of legislation and then as to its being contrary to any provision of the Constitution or laws of the United States.

54 The word rightful, as used in the organic act of said Territory, is, in our opinion, substantially equivalent to the word lawful, and Congress, by its use, intended only to prohibit legislation that was wrongful in a legal sense and not necessarily all that might be offensive to the highest standard of moral ethics.

At the time said act was passed was it lawful for legislative bodies not restricted by any constitutional provisions to pass acts of divorce, and were such acts legal and of effect?

That must be considered as legal and binding which is recognized and enforced by the courts; and if this be so, then in 1852, when this act was passed, such acts examined in the light of all the adjudications upon that subject must be held to be legal and within the legislative power, and this, too, despite the fact that the powers of government, under which such acts had been passed and said adjudications had, had been by the sovereign power distributed into the legislative, executive, and judicial branches.

This proposition is so fully established by the text writers upon the subject and the cases by them cited that a simple reference to some of them will suffice to show it, though it is clear from what is said by most of them that upon moral grounds they regretted that such had been and was the cause of decision upon the subject.

55 See 1st Bishop on Marriage & Div., p. 664.
Cooley Const. Lim., 4th Ed., p. 132.
2nd Kent's Com., 98 & 105.

Beside, the existence of this power as a part of the legislative branch of government has been so well understood that nearly all of the State constitutions have, by express provisions, restrained their Legislatures from exercising this power; and, while this fact may tend to show that the exercise of it was not approved by the moral sentiment of such States, we think that it likewise tends clearly to show that in the absence of such restrictions its exercise would be lawful and sustained by the courts.

The passage of the act in question was then a rightful subject of legislation.

If this act was inconsistent with the Constitution or laws of the United States it is because the marriage relation is a contract such as the said Constitution and laws intended to protect from impairment.

And it has been so often decided that such relation is a status rather than a contract, and that the vested rights therein, if any, must yield to the public interest in the regulation and control of such status, and the opinions therein rendered have been so
56 numerous and able, that we content ourselves with a reference to a few of such decisions, from which it will appear that the marriage relation is not a contract within the meaning of the constitutional restrictions above referred to.

See Butler *vs.* Penn'a, 10 How., 302 & 416.
Adams *vs.* Palmer, 51 Maine, 480.
1 Bishop on Marriage & Div., p. 2, 19, 667, & 669.
Cooley Const. Lim., 134.
Brigham *vs.* Miller, 17 Ohio, 445.

Beside, we think that the fact that Congress nullified certain acts of this nature and did not, when its attention was called to the subject, change the general law as to the power of territorial Legislatures in the premises tends strongly to show that, in its opinion, such acts were lawful and of full effect, unless set aside by it under its power of supervision over all of the laws of the Territories.

But it is said that the wife was never domiciled in the said Territory of Oregon, and consequently said act can have no effect upon her or her rights, but with this claim we cannot agree, for if we admit that under the facts pleaded she was domiciled in the State of Ohio, still, as the husband was a resident of said Territory,
57 the Legislature could regulate his status therein, and having released him from the bonds of his marriage he was, at least while in said Territory, absolved from all its duties and deprived of all its rights, and from the time he was thus released he occupied the status of a single and not that of a married man, and the wife could not come here and assert any right as such wife thereafter.

Did the wife, at the time said act was passed, have such a vested right in her half of said donation claim as would continue to her, notwithstanding its passage?

We think not, as it is now the settled law that no title passes to such donation claimants until the settlement and culivation required by law has been fully completed.

See Hall *vs.* Russell, 101 United States, 503.

Her rights therefore were simply contingent, liable to be defeated by the acts of the husband, and in no sense so vested as to be protected from legislative interference.

Beside, the facts pleaded show that as to her half of said claim there never was any compliance with the requirements of said donation law, as after said divorce the status of her former hus-
58 band was that of a single and not a married man. His residence and cultivation could only serve to complete title to his half of said claim, and as there was no other settlement or cultivation it follows that her half has never been earned, but remained the property of the United States and was properly disposed of as such.

For a more elaborate discussion of the questions involved in this case we refer to and approve the opinion of this court by its chief justice in the case of Maynard *vs.* Valentine, 2nd Wash. T'y, page 3.

Let a decree be entered here, as in the court below, dismissing the complaint and for costs in favor of the defendants.

JOHN P. HOYT,
Associate Justice.

I concur.

GEORGE TURNER,
Associate Justice.

It does not appear, except inferentially, that I dissented from the decision in the case of Maynard *vs.* Valentine, First Wash. Territory Reports, page 3, but I did dissent therefrom, and I dissent from the majority opinion in this case.

S. C. WINGARD,
Associate Justice, &c.

59 *Transcript from Journal of Supreme Court of Washington Territory of September 12th,* 1884, *Being the July Term of said Court for* 1884.

Vol. 2, page 415.

HENRY C. MAYNARD *et al.*, Appellants,

vs.

W. C. HILL *et al.*, Appellees.

This cause coming on to be heard upon the transcript of the record of the district court of the 13th judicial district of Washington Territory, holding terms at Seattle, is argued by C. H. Hanford, Esq., of counsel for appellants, and by O. Jacobs, of counsel for appellees; and, the said argument being concluded, the court takes the matter under advisement.

60 *Judgment.*

Vol. 2, p. 432.

Transcript of judgment rendered by the supreme court of Washington Territory on the 22nd day of September, A. D. 1884, being the July term of said court for 1884.

HENRY C. MAYNARD, FRANCIS J. PATTERSON and Her Husband, MARTIN PATTERSON, Appellants, Plaintiff- in Error,
v.
W. C. HILL, J. VANCE LEWIS, and JOHN H. FLAGG, Appellees, Defendant- in Error. } #374.

This cause having been heretofore submitted to the court upon the transcript of the record of the district — of the third judicial district of Washington Territory, holding terms at Seattle, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, deciding that said appellants' complaint does not state facts sufficient to constitute a cause of action
61 and that no grounds for relief in equity appear and that said appellees' demurrer to the complaint should be sustained because of the insufficiency of said complaint:

It is now, on this 22nd day of September, 1884, on motion of Orange Jacobs, Esq., of counsel for the appellees, considered, adjudged, and decreed by the court that said appellants' complaint herein be, and the same is hereby, dismissed, and that W. C. Hill, J. Vance Lewis, and John H. Flagg, appellees and defendants herein, do have and recover of and from Henry C. Maynard, Frances J. Patterson, and her husband, Martin Patterson, the appellants and plaintiff- herein, the costs and disbursements in this appeal, taxed and allowed at $43.80 *dollars*, and that execution issue therefor.

And now, afterwards, on the same day, the said appellants, by their attorney, C. H. Hanford, Esq., and in open court give notice that they appeal to the honorable Supreme Court of the United States from the decision and final decree given by this court and now entered herein; and it is now ordered by the court that said notice of appeal be entered of record herein, which is now done.

And now, afterwards, on this 22 September, 1884, the court having heard and considered the petition of the appellants herein for the allowance by this court of their appeal from the final
62 decree of this court in this cause to the Supreme Court of the United States, and it appearing to the court that the subject-matter of the controversy herein is a tract of land of the value of ten thousand dollars; that said appellants have duly taken an appeal from the final decree of this court in this court to the Supreme Court of the United States, and that said appeal should be allowed:

It is therefore ordered by the court that said petition be, and the same is hereby, granted, and that said appeal to the Supreme Court

of the United States be, and the same is hereby, allowed, and that this cause be certified up to the Supreme Court of the United States.

63 *Appeal Bond.*

In the Supreme Court of Washington Territory. July Term, 1884.

HENRY C. MAYNARD, FRANCES J. PATTERSON, and Her Husband, MARTIN PATTERSON, Appellants.

vs.

W. C. HILL, J. VANCE LEWIS, and JOHN W. FLAGG, Appellees.

Know all men by these presents that we, Henry C. Maynard, Frances J. Patterson, and Martin Patterson, as principals, and John Leary and Frank Hanford, as sureties, are held and firmly bound unto W. C. Hill, J. Vance Lewis, and John H. Flagg in the sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we, jointly and severally, bind ourselves and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 22d day of September, A. D. 1884.

The condition of this obligation is such that whereas the above-
bounden Henry C. Maynard, Frances J. Patterson, and Martin
64 Patterson have taken an appeal to the Supreme Court of the
United States from the final judgment and decree in the above-entitled cause, rendered by the supreme court of the Territory of Washington on the 22nd day of September, A. D. 1884:

Now, therefore, if the said appellants shall prosecute their said appeal and if they fail to make their plea good shall answer and pay all costs made in such cause, these presents shall be void; otherwise of full force and effect.

HENRY C. MAYNARD, [SEAL.]
By C. H. HANFORD, *His Att'y-in-Fact.*
FRANCES J. PATTERSON, [SEAL.]
By C. H. HANFORD, *Her Att'y-in-Fact.*
MARTIN PATTERSON, [SEAL.]
By C. H. HANFORD, *His Att'y-in-Fact.*
JOHN LEARY. [SEAL.]
FRANK HANFORD. [SEAL.]

TERRITORY OF WASHINGTON, } ss:
County of King, }

John Leary and Frank Hanford, whose names are subscribed to the above bond as sureties thereto, being first duly sworn, each for himself says that he is worth the sum of one thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution, and that he is a resident of King county, Washington Territory.

JOHN LEARY.
FRANK HANFORD.

65 Subscribed and sworn to before me the 22nd day of September, A. D. 1884.

A. E. HANFORD,
Notary Public in and for King County, Washington Territory.

And upon the back of said appeal bond are endorsed the words, letters, and figures following, to wit:

"Now, Sept. 24th, 1884, the within bond, having been presented to the court upon examination, is here now approved.

"S. C. WINGARD,
"*Acting Chief Justice, &c.*"

66 *Cost Bill.*

In the Supreme Court of W. T. July Term, 1884.

HENRY C. MAYNARD *et al.*
vs.
W. C. HILL *et al.* } No. 374.

Clerk's fees	18 80
Binding transcript	
Sheriff's fees	
Printing brief	10 00
Attorney fee	15 00
Miscellaneous fees	25 00
Total	$68 80

TERRITORY OF WASHINGTON, } ss:
County of Thurston,

O. Jacobs, being first duly sworn, says that he is of counsel for the def'd't- in error in the above-entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and the same is true, as he verily believes.

O. JACOBS.

Subscribed and sworn to before me this 24 day of September, 1884.
R. G. O'BRIEN, *Clerk.*

[Endorsed:] No. 374. In supreme court W. T. July term, 188–. Maynard *et al. vs.* Hill *et al.* Cost bill. Filed —— —, 188–.

67 TERRITORY OF WASHINGTON, } ss:
County of Thurston,

In the Supreme Court of Washington Territory, Holding Terms at Olympia.

I, R. G. O'Brien, hereby certify that I am clerk of the supreme court of the second judicial district of Washington Territory, the same being a court of record and having in common law jurisdiction

and a seal; and I further certify that the annexed writing is a true copy of the transcript of the record of the dist. court of the 3d judicial dist. holding terms at Seattle, in said cause filed and upon which the cause was tried, together with all proceedings in this supreme court, as the same now appears of record in my office at Olympia.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 8th day of December, A. D. 1884.

[Seal Supreme Court Washington Territory.]

R. G. O'BRIEN, *Clerk.*

Endorsed on cover: Washington Territory supreme court. No. 194. Henry C. Maynard, Francis J. Patterson, and Martin Patterson, appellants, *vs.* W. C. Hill, J. Vance Lewis, and John H. Flagg. Filed 19th December, 1884.

125-19

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 194.

HENRY C. MAYNARD, FRANCES J. PATTERSON, AND MARTIN PATTERSON, APPELLANTS,

vs.

WM. C. HILL ET AL.

BRIEF OF COUNSEL FOR APPELLANTS.

HENRY BEARD,
C. H. HANFORD,
Attorneys for Appellants.

Judd & Detweiler, Printers.

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STATEMENT OF THE CASE.

This cause was brought into this Court on appeal from a judgment of the supreme court of Washington Territory against the appellants and dismissing their bill.

They filed their bill of complaint in the third judicial court of the county of King, in said Territory, March 3, 1883, to compel the defendants to convey to complainants, as heirs of Lydia A. Maynard, the following-described lands situate in said county, viz: Lots 9 and 10, of section 4; lot 13, of section 4; lot 14, of section 4; lots 6 and 7, of section 5; and lots 8 and 9, of section 5, all in township 24 north, range 4 east, Willamette meridian; and for other relief. (Record, pp. 6, 7, paragraphs 16, 17, and 19 of the bill.)

Demurrers to said bill were filed March 30 and *April* 12,

1883, on the ground "that the said complaint does not state facts sufficient to constitute a cause of action." (Record, pp. 13, 14.)

Judgment was entered on said demurrers in favor of defendants and against plaintiffs on the 19th of April, 1883 (p. 15).

Appeal was taken to the supreme court of the Territory May 16, 1884 (pp. 18, 19), and the case was heard in said supreme court at the July term, A. D. 1884, viz., on the 12th September, 1884 (p. 22), and on the 22d September, 1884, judgment was entered against plaintiffs and the bill ordered to be dismissed because of the insufficiency of said complaint (p. 23).

On the same day complainants gave notice in open court of appeal to the Supreme Court of the United States, which was entered of record and allowed. (Record, pp. 23, 24.)

(Affidavit had been filed September 20, 1884 (Record, p. 19), showing that the value of the land in controversy is ten thousand dollars, and "at the time of the commencement of this action was and is now of greater value than five thousand dollars." The value alleged in the bill of complaint is ten thousand dollars. (Record, p. 6, par. 16.)

The appeal bond was approved September 24, 1884, by the acting Chief Justice. (Record, pp. 24, 25.)

The opinion of the supreme court of Washington Territory, filed in this case, is in the record (pp. 19 to 22, inclusive). One of the three justices who tried the case dissented therefrom.

From the bill and exhibits in the case it appears that David S. and Lydia A. Maynard intermarried in the year 1828 in the State of Vermont, and have both died intestate, David S. in the year 1873 and Lydia A. in the year 1879. The plaintiffs, Henry C. Maynard and Frances Patterson, are the only issue of that marriage. (Record, p. 1, pars. 1, 2.)

In the year 1850 David S. and Lydia A. Maynard were living in the State of Ohio—their children, Henry C. and Frances J., being minors. In that year David S. left his family in Ohio and started overland for California, under a promise by him to his wife that he would either return to his family or send for them within two years, and in the meantime would send her means of support; but he never did any of these things. (Record, p. 2, par. 4).

On the 16th September, 1850, he took up his residence in Oregon, in that part which is now Washington Territory. (Record, p. 2.)

On the 3d April, 1852, said David S. Maynard settled on and claimed a tract of land in Washington Territory of 640 acres, which is particularly described in the record (p. 2, par. 6).

We quote from the complaint the following statements. (pp. 3, 4, 5 and 6):

"VII.

"That on the 22nd day of December, 1852, an act was passed by the Legislative Assembly of the Territory of Oregon; which act is in the words and figures following, to wit:

"'An act to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.

"'SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are hereby, dissolved.

"'Passed the house of representatives Dec. 22nd, 1852.

"'B. F. HARDING,

"'*Speaker of the House of Representatives.*

"'Passed the council Dec. 22d, 1852.

"'M. P. DEADY,

"'*President Council.*'

"That no cause at any time existed for such divorce; no notice of any kind was given to said Lydia A. Maynard of any application by said David S. Maynard for a divorce or of the introduction or pendency of the bill for said act in the said Legislative Assembly of the Territory of Oregon, nor did said Lydia A. Maynard have any knowledge of the passage of said act until the month of July, 1853, and at the time of the passage of said act said Lydia A. Maynard was not within the limits or an inhabitant of Oregon, and she never became a resident of either the Territory or the State of Oregon, and she never in any manner acquiesced in or consented to said act, and the said Legislative Assembly had no authority to pass said act, and the same is and at all times has been absolutely void, and said David S. Maynard and Lydia A. Maynard never were lawfully divorced.

"VIII.

"That on or about the 15th day of January, 1853, said David S. Maynard entered into a pretended marriage with one Catharine T. Brashears, and thereafter lived and cohabited with her until the time of his death, but without issue.

"IX.

"That on the 7th day of November, 1853, said David S. Maynard filed with the surveyor general of Oregon his notification No. 407, under the said act of Congress of September 27th, 1850, as amended by the act of Congress, approved the 14th day of February, 1853, and with said notification said David S. Maynard filed his own affidavit, alleging his residence in Oregon from the 16th of September, 1850, and residence on said land from the 3rd day of April, 1852, and that he was married to said Lydia A. Maynard until the 24th day of December, 1852. * * *

(At the same time he filed corroborating affidavits showing his said settlement and residence to 26 Oct., 1853, Record, p. 9.)

"X.

"That by virtue of an act of Congress, approved the 17th day of July, 1854, entitled 'An act to amend an act approved

September twenty-seventh, eighteen hundred and fifty, to create the office of surveyor general of the public land in Oregon, &c., and also the act amendatory thereof, approved February fourteen, eighteen hundred and fifty-three,' the offices of register and receiver for Washington Territory were created, and such officers were duly appointed pursuant to said act and prior to the 30th day of April, 1856, and their offices were duly established at Olympia, in Washington Territory; and said register and receiver were, on said 30th day of April, 1856, and at all times since said last-mentioned date, duly authorized to take the proofs required and to issue certificates as provided by section seven of said act of the twenty-seventh of September, 1850.

"XI.

"That on the 30th day of April, 1856, said David S. Maynard made proof before said register and receiver of his residence upon and cultivation of his said claim, to wit, the tract of land described in paragraph VI of this amended complaint from the 3rd of April, 1852, to and including the 3rd of April, 1856; and on the 14th of May, 1869, said register and receiver issued donation certificate No. 440 to said David S. Maynard and to said Catherine T. Maynard, as his wife, for said claim, and apportioned the west half of said claim to said David and the east half thereof to said Catherine; and on the 21st of July, 1873, the Commissoner of the General Land Office annulled said certificate as to said Catherine, on the ground that, as it then appeared and was supposed that said Lydia A. Maynard was dead, her heirs were, in the opinion of said Commissioner, entitled to the wife's half of said claim.

"XII.

"That on the 8th of April, 1872, after a full hearing before said register and receiver, at which said Lydia A. Maynard appeared in person, said register and receiver duly issued donation certificate No. 440 to said David S. Maynard for the west half and to said Lydia A. Maynard for the east half of said land hereinbefore described.

XIII.

"That an appeal was taken from the said decision of said register and receiver in awarding the east half of said land to said Lydia A. Maynard to the Commissioner of the General Land Office, and an appeal was also taken from the decision of said Commissioner to the Secretary of the Interior, and a final decision was rendered thereon by said Secretary on the 1st day of March, 1873; that in said final decision of said Secretary the facts are found to be and are stated as follows: 'On the 26th of October, 1853, the said Maynard made his notification No. 407 as a married man for a donation claim containing 640 acres in Oregon, under the act of September 27th, 1850, as amended by the act of February 14, 1853.

"'He was married to Lydia A. Maynard in 1828, in the State of Vermont. He subsequently removed with his wife to the State of Ohio, and went thence to the Territory of Oregon, leaving his wife in Ohio. September 16, 1850, he took up his residence in Oregon, and April 3, 1852, settled upon and commenced cultivation of the tract in controversy.

"'December 24, 1852, he was divorced by an act of the Territorial Legislature of Oregon. January 15, 1853, he intermarried with Catharine T. Maynard, his present wife, who lived with him on the premises until after the expiration of the four years of settlement and cultivation.

"'It is satisfactorily shown that Maynard has fully complied with all the requirements of the law relating to settlement and cultivation. The register and receiver, April 8, 1872, issued a donation certificate, which gave the west half of the tract to David S. Maynard and the east half to his first wife, Lydia;' and said Secretary, by said final decision, affirmed the said decision of said register and receiver in awarding the west half of said tract to said David S. Maynard, and a patent was thereupon duly issued to said David S. Maynard for said west half of said tract, but said Secretary, by his said final decision, erroneously reversed the said decision of said register and receiver as to said Lydia Maynard and as to the east half of said tract, and said Secretary and the Commissioner of the General Land Office thereafter erroneously caused the word 'canceled' to be written across the face of said donation certificate No. 407, and erroneously

refused to issue a patent to said Lydia A. Maynard for said east half of said tract, and erroneously attempted to restore said east half of said tract to the public domain; that duly certified transcripts of said donation certificate No. 407 and of said final decision of said Secretary are hereunto annexed and are marked Exhibits 'E' and 'F,' and the same are hereby referred to for greater certainty, and by such reference the same are hereby made a part of this complaint.

XIV.

"That the said donation certificate No. 407 was lawfully issued to said David S. Maynard and Lydia A. Maynard, and the action of said Secretary and of the Commissioner of the General Land Office in refusing to issue a patent to said Lydia A. Maynard for the east half of said tract and in causing the word 'cancelled' to be written upon the face of said donation certificate was illegal and in contravention of the rights of said Lydia A. Maynard; that said erroneous and illegal action arose from a misconstruction and misapplication of the law by said Secretary, in this, that said Secretary, by his said decision, held that the *vinculum* of the said marriage between said David S. Maynard and Lydia A. Maynard was severed by said act of the Territorial Legislature of Oregon, whereas said act is void, because said Legislature had no power to so enact, and in this, that said Secretary, by his said decision, held that said Lydia A. Maynard never acquired or had any greater rights in or to said land than her said husband had at the time of the passage of said act of said Territorial Legislature, whereas by virtue of the provisions of said act of Congress of September 27, 1850, and the acts amendatory thereof, and by compliance with the provisions thereof on the part of said David S. Maynard, the said Lydia A. Maynard became fully entitled to one-half of said tract of 640 acres.

"XV.

"That in the year 1861 the public lands in said township twenty-four north, of range four east, were surveyed and platted under the direction of the Commissioner of the General Land Office of the United States, and the whole of the

said tract of 640 acres described in paragraph VI of this amended complaint is exhibited on said plats as Maynard's donation claim.

"XVI.

"That in the year 1880 the defendants, W. C. Hill and J. Vance Lewis, with full knowledge of the rights of said Lydia A. Maynard and of her heirs, located the whole of said east half of said tract described in paragraph VI of this amended complaint with certain land scrip known as Porterfield scrip, and on the 9th day of January, 1882, patents were issued to said defendants for certain portions of said east half of said tract as follows, to wit: One patent for lots 9 and 10 of section 4, and one patent for lot 13 of section 4, and one patent for lot 14 of section 4, and one patent for lots 6 and 7 of section 5, and one patent for lots 8 and nine of section 5, all in said township twenty-four north, of range four east, and all in said east half of said tract of 640 acres; that the said lands so patented to said defendants are of the value of at least ten thousand dollars.

"XVII.

"That said defendants are applicants for patents to the remaining portions of said east half of said tract."

The bill of complaint concludes as follows:

"XIX.

"That said plaintiffs, Henry C. Maynard and Frances J. Patterson, are the equitable owners of the lands patented to said defendants, Hill and Lewis, as aforesaid.

"And said defendants are equitable trustees of the legal title to said lands for said plaintiffs.

"Wherefore plaintiffs pray that said defendants may be decreed by this court to be such trustees, and that said defendants be ordered by the decree herein to convey said lands, by a good and sufficient deed, to said plaintiffs by a day certain, and that in default thereof said lands be conveyed to plaintiffs by a commissioner to be appointed by this court for

that purpose, and for costs and disbursements and such other and further relief in the premises as to the court shall seem meet and equitable.

"C. H. HANFORD,
"*Attorney for Plaintiffs.*"

The important portion of the act of Congress of July 17, 1854, referred to above in paragraph 10 is as follows (10 Stat., 306):

"SEC. 6. *And be it further enacted*, That all the provisions of this act and the acts of which it is amendatory shall be extended to all the lands in Oregon and Washington Territories, and for the purpose of carrying said acts into effect in said Territories the President shall be, and he is hereby, authorized to appoint a register and receiver for each of said Territories, whose powers, duties, obligations, and responsibilities shall be the same as are now prescribed for other land officers and for the surveyor general of Oregon, so far as they apply to such officers." * * *

The donation certificate issued by the register and receiver of the land office at Olympia to D. S. Maynard and Lydia Maynard under this statute is found in the Record, pp. 10 and 11, as is also the full decision of the Secretary of the Interior of March 1, 1873, against the right of Lydia (then living) to a patent for her half of the 640 acres mentioned in the certificate. (Record, pp. 12 and 13.)

The sections in the acts of Congress of 1850 and 1853 which have any bearing on the questions involved in this case are printed in an appendix hereto.

ERRORS ASSIGNED.

I.

1. The court below erred in its opinion and decision that the legislative act of Oregon Territory, purporting to dissolve the bonds of matrimony between D. S. and Lydia

Maynard, had any effect upon the right, share, or interest of said Lydia in said donation claim.

2d. The court erred in holding and deciding that said legislative act was valid to divorce the said married persons.

3d. The court erred in dismissing said bill.

It has not been questioned but that the plaintiffs are entitled to the relief sought for, if these errors have really been committed or either of them.

The decision of the supreme court of Washington Territory follows, in substance, that of the Secretary of the Interior. The Secretary found that Maynard had satisfactorily proved his full compliance with the requirements of the law, as to settlement and cultivation, and he also recited the other facts of his case, which entitled Maynard to 640 acres; but he held the divorce to be valid, and that the rights of Lydia fell by the dissolution of the marriage; also that "if the estate of David had not vested for 640 acres at the time of the divorce the wife has no claim now." (Record, pp. 12, 13.)

These errors in executive action have led to the rejection of the rights of the ancestor of the plaintiffs and to the encumbrance of the lands of the plaintiffs by the outstanding patents issued to defendants. Defendants took their title with full knowledge of the rights of Lydia Maynard, and the filing of the bill found them still holding their titles.

The case is, therefore, one in which relief will be granted if the law has been misconstrued and misapplied.

ARGUMENT.

The construction of the fourth section of the Oregon donation law is involved; possibly that construction will determine this case.

The enactment is one of the most condensed and comprehensive which can be found on the statute books. The multitude and variety of cases coming within its provisions excite our wonder, and the skill with which it was drawn calls for our admiration.

This Court has mentioned this statute as one of a most benevolent character, the 4th section as having been "passed for the purpose of rewarding in a liberal manner a meritorious class of persons who had taken possession of that country, and held it for the United States, under circumstances of great danger and discouragement."

See Silver *vs.* Ladd, 7 Wallace, 225.

It also proposed rewards for others who should settle, and for women who should marry settlers, within limited periods. (Secs. 4 and 5,)

It gave a reward to settlers in Oregon, and an inducement to white male citizens, &c., to emigrate prior to December 1, 1853. These rewards and inducements are for men. To women the inducements are of marriage to the settler within limited periods.

Settlement, cultivation, and four years' residence are prescribed for a claimant, who, under section 5, *must* be a "male" (and under section 4 is a male in 99 cases out of 100), and are required of the man where the portion of a married pair is claimed. Marriage within the limited time to such settler is all that is required of the woman.

In respect to the general spirit of the law it is clear that Lydia, who remained in a former home in Ohio, having two minor children, issue of her marriage with Maynard, in

charge, whilst he sought a new home for them in Oregon, is within the spirit of the law. She endured the care and labor of providing for herself and children whilst Maynard went out to Oregon, and assisted in holding and improving that country.

We propose to confine this discussion to the precise case developed in the record, as every hypothesis that might vary any one of the material facts would open other questions and enlarge the ground of debate.

FIRST PROPOSITION. THE GRANT TO LYDIA MAYNARD.

We claim that David S. Maynard *fulfilled the law so as to acquire a donation of* 640 *acres, and that one-half thereof enured to Lydia Maynard as her donation by the effect of the grant.*

The grant (section 4) is to such a person as Maynard, viz., to a white settler or occupant of the public lands—

"A citizen of the United States now residing in said Territory, or who shall become a resident thereof on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act. * * * If a married man or if he shall become married within one year from the first day of December, 1850, the quantity of one section or 640 acres, one-half to himself and the other half to his wife, to be held in her own right, and the surveyor general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office," &c. * * *

"In all cases provided for in this section the donation shall embrace the lands actually occupied and cultivated by the settler thereon."

Section 7 of the act of 1850, modified by section 6 of the act of February 14, 1853, required the filing of a written notice and preliminary proof of the time of commencement of settlement on the described land when unsurveyed, and provided that the settler—

"At any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner by two disinterested witnesses the fact of continued residence and cultivation required by the fourth section of this act, and upon proof being made the surveyor general *or other officer appointed for that purpose* shall issue certificates, under such rules and regulations as may be prescribed by the Commissioner of the General Land Office, setting forth the facts in the case and specifying the land to which the parties are entitled. And the said surveyor general shall return the proof so taken to the office of the Commissioner of the General Land Office, and if said Commissioner shall find no valid objection thereto patents shall issue for the land according to the certificate aforesaid upon the surrender thereof."

These orderly proceedings were all had in Maynard's case, and no objection was found to his proofs of the facts of the case into which the law gave the officers authority to inquire.

The proofs showed marriage with Lydia at the date of the law and at the date of settlement; but the second wife, Catharine, set up a claim and it was investigated, and it was found that she did not assert a marriage prior to the 1st of December, 1851, and no further notice of her was needed.

This was the end of all jurisdiction which the executive officers had. They could inquire if the law had been complied with by David, if he were a married man or not, and what woman, if any, was married to him at the date of the donation law or before December 1, 1851; but further than that they had no jurisdiction to examine into his domestic affairs, for beyond these things the other affairs of his life had nothing to do with his donation.

They were not charged by the law with finding out whether he had been divorced before or after the beginning of his settlement, or how often he had been divorced, or whether the divorces were or were not valid.

The Secretary of the Interior had no further jurisdiction in the case than the local land officers had, and we here mention it to their credit that they have made no note of Catharine's claim or Lydia's divorce upon the certificate which they issued April 9, 1872. The officers had no authority to consider the legislative act divorcing David S. and Lydia—certainly none to decide that it had any effect upon the rights of Lydia under the act of Congress. It did not contradict any of the evidence submitted by Maynard to show his compliance with the law, and was therefore of no relevancy to the issues of which they had jurisdiction.

To sustain our proposition and the allegation of error first above assigned it is enough for us to show that the grant to David S. Maynard was fully vested upon the fullfilment of the conditions of the grant. It was initiated by his valid settlement of the land and perfected on full compliance with the law.

It is certain that there was a grant and a grant of lands, and that *the grant is made by the law*, and that the law is a law of the United States. The first words of section 4 are: "There *shall be, and hereby is, granted* to every white settler or occupant," &c. Further on in the same section we find these words: "So as to entitle them *to the grant* as above provided." "No alien shall be entitled to a patent to *land granted* by this act until," &c. And again, at the end of this section, claimants were inhibited from claiming "both under *this grant* and the treaty" (see art. 3d, 9 Stat., 870), and confined to "*a single grant of land.*" The treaty protected British subjects in the rightful *possession* of land, and it was between such possessive rights, as aliens, and a donation as American citizens, that they were allowed to choose. In section 5 the word granted occurs twice, and the tract secured is called "a donation of land."

This grant is to a "*settler*," &c., and we find also that "settler" and "settlement" occur about a dozen times in the law, and make the settlement a matter of primal importance. All

the requirements of the law to be fulfilled after settlement are addressed to "the settler."

As the donation is by law specified in its general location or determined by the occupation and cultivation "by the settler thereon," who is authorized to give notice of his boundaries, it seems that the grant becomes specific, and is located by the "*settler's*" improvements, which on the ground are notice to the neighbor or the traveler, and when defined in the proper land office, by the legal notification, inform the United States and all interested inquirers.

But the *notice* cannot be the inception of the right to the land, for in the majority of cases the four years' residence and cultivation had been performed before notice was required.

The law requires this residence and cultivation to be continuous for four years, and when such settlement and continued residence and cultivation thereof shall have been proven the settler shall have a patent certificate.

This Court has held in this class of cases, under the donation law, that as between the settler and the United States—

"The right to a patent once vested is equivalent, as respects the Government dealing with the public lands, to a patent issued."

"When, in fact, the patent does issue, it *relates back to the inception of the right of the patentee*, so far as may be necessary to cut off intervening claimants."

Stark *vs.* Starrs, 6th Wallace Rep., 402.

In Barney *vs.* Dolph. (97 U. S. Rep., p. 652) this language is repeated, with an addition, and it is said (p. 656):

"When the right to a patent once became vested in a settler under the law it was equivalent, so far as the Government was concerned, to a patent actually issued. We so decided in Stark *vs.* Starrs (6 Wallace, 402). The execution and delivery of the patent, after the right to it is complete, are the mere ministerial acts of the officer charged with that duty."

We cite also Wirth *vs.* Branson (98 U. S. Reps., 118) where it is said (in syllabus):

"A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect his rights thereunder will not be defeated by the issue of a patent to another party for the same tract."

See also Garland *vs.* Winne, 20 Howard's Rep., p. 6.
Lindsey *vs.* Hawes, 2 Black, 554.

In the Maynard case, when Maynard had fulfilled all requirements of the law he became entitled to the patent for the entire 640 acres, "one-half to himself and one-half to his wife in her own right."

In Kansas Pacific Railway Company *vs.* Atchison, Topeka and Santa Fé Railroad Company (112 U. S. Reps., at p. 422) this Court said:

"The Kansas Pacific Railway Company, under the acts of Congress of 1862 and 1864, by a compliance with their provisions *in the construction of its road, acquired the title to the lands in controversy, and has accordingly a right to record evidence of it in the form of a patent.*"

This Court therefore reversed the decree below and directed one to be entered requiring the defendant, who had received the evidence of title from the United States, to execute to the plaintiff a conveyance of its claim and interest in the lands.

The case is like the one at bar, in this, that the plaintiff by compliance with law, was found to be vested with a right to the patent, which had not been made to it, but the evidence of title to the same lands had been wrongfully given to the other party.

Of late years much light has been thrown on the question under discussion by a number of decisions of this Court in railroad cases.

In Van Wyck *vs.* Knevals (106 U. S. Rep., 360, at page 368) it appears that the *whole* of the railroad was not completed, but that the part opposite the land had been, and the Court held the title of the railroad company to be complete, and at page 370 affirmed the decree below ordering the defendant, Van Wyck, who had obtained a patent from the United States, to execute a conveyance of the lands to the complainant, who held under the railroad company.

In the case of Walden *vs.* Knevals (114 U. S. Rep., 373) a similar decree was affirmed in favor of Knevals and against Walden, who also had obtained an adverse patent from the Government (p. 376).

See also Missouri, Kansas, and Texas R. R. Co. *vs.* Kansas Pacific R. R. Co. (97 U. S. Rep., 491).

These decisions establish the proposition that where one party has a completed right to receive a patent for land, the sale or disposal of the same land by the United States to another is invalid, and the party whose right was vested and did not obtain the patents of the United States is entitled to a decree for a conveyance against the party who did procure a patent.

These cases are directly in point here. That David S. Maynard had fully complied with the law and applied for the patent for the 640 acres, and the certificate of April 9, 1872, had issued during the lifetime of both David and Lydia, is shown by the record.

Whatever right had been obtained against the United States had fully vested at or before the issuing of that certificate, and the only question raised is as to what quantity of land were said David and Lydia then entitled. Had Lydia's right been barred or extinguished?

By no means. The claim was against the United States, and the United States had done nothing to divest it.

There was no law authorizing the executive officers to do as they did—that is, to cut down the claim of the settler to

320 acres and cancel the certificate of the wife's right in the 640 acres.

Maynard was fully qualified to take up a donation of 640 acres, or a section, and all the proofs and papers show that he did comply with the law for that quantity. He could not be put off with less nor could Lydia be denied the one-half to be held by her in her own right. It was *the law that made the donation*. The executive officers could not curtail, enlarge, or change it for want of authority. The law gave all the claim (640 acres) to the settler, but authorized the officers "to designate the part enuring to the husband and that to *the wife*" to be held by her in her own right. This the local officers did, and they assigned the east half of the claim to Lydia, and it is for lands within that east half that this suit is prosecuted.

THE RESIDENCE AND CULTIVATION ARE REQUIRED OF "THE SETTLER" ONLY. HIS WIFE'S TITLE IS COMPLETED WHEN HIS IS.

In an early decision of the supreme court of Oregon (Van Dolf *vs.* Otis, 1 Oregon Reports, p. 153) it was said:

"Whenever a claimant is otherwise competent he is entitled to 640 acres under section four, *if a married man*, and no other exposition of his family affairs is necessary to establish his right. More than this, the surveyor general has no authority by law to inquire into, or to receive evidence as to the age or complexion of a claimant's wife. Such claimant is not bound to prove more or permitted to prove less than the said act requires to perfect his title to a land claim" (p. 153).

This doctrine has never been judicially overturned; on the contrary, it has been approved.

See decision of the U. S. Attorney General, 10 Opinions, 381.

To secure the wife's part it is not necessary that the marriage should continue during the four years of residence or any specific part thereof; for it would be possible under the law that the residence should be completed before the marriage, and the case of the death of the wife before the issuing of the patent is provided for.

In *Vance* vs. *Burbank*, 101 U. S. Rep., at 520, 521, this Court held as follows:

"The 'settler' is made by the statute the actor in securing the grant. He must notify the surveyor general of his claim. He must occupy and cultivate the land, and otherwise conform to the provisions of the act, and he, or some one for him, must also make the final proof. When this is done, and he becomes entitled to the grant, his wife takes her share in her own right, but up to that time he alone makes the claim. His acts affecting the claim are her acts. His abandonment, her abandonment. His neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The Land Department, until the final proofs are made, knows only the husband."

In *Davenport* vs. *Lamb* (13 Wallace, 418) the land involved was part of a wife's share. The settlement began September, 1848. The marriage was in July, 1850. The wife died in 1854, leaving the husband a survivor of the marriage. The certificate issued in 1860 to the settler and his wife Nancy. The patent issued in accordance therewith in May, 1862, at which time Daniel Lounsdale, the settler, was dead. Nancy left two children by Lounsdale and two by a former husband.

Held by the court that the patent was good under an act of Congress of 1836, and that *under the donation law* the surviving husband and the four children of Nancy took each the one-fifth part of her half.

In the case at bar the settler, Maynard, died before Lydia, and therefore it is not embarrassed with any question as to a survivor's rights in her share.

The patent might, therefore, now issue either to her or her heirs under this interpretation given in the Davenport case by this Court, if the opposing patents to defendants had not issued; and the case cited is an authority directly in point.

The elaborately discussed cases of *Hall* vs. *Russell* (101 U. S. Rep.) and *Vance* vs. *Burbank* (same vol., p. 514) are direct authorities in the present case. So far as they interpret this statute they support our position.

In the first-named case the facts were that James L. Loring, in the year 1849, made a will devising all his estate to Samuel P. Hall. In April, 1852, he settled on and claimed the land in dispute under the Oregon donation law. He "died after a residence on the land of less than a year." Hall claimed under the will.

Joshua Delay and wife afterwards settled upon the same land and obtained a patent. The defendants in the case held the title of Delay and wife, and also *that of James Loring's heirs.*

The question raised and decided in the negative was, Had Loring at his death an interest in the land which could be devised by will?

Though such was the decision, the Court upheld the title *derived from the heirs of Loring*, because of the provisions of the eighth section of the law, and said their title, under that section came from the United States—that is, as a donation to them according to the eighth section.

The Court took no notice of the Delay title, but in concluding the opinion said of the heirs (pp. 513, 514):

"Their title to the land was to come, not from their deceased ancestor, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. Whether they took immediately on his death or after proof of his compliance with the provisions of the act while in life need not be decided. It is enough for

this case that when their ancestor died he had nothing in the land which he could transmit to them, and that what they afterwards got came from the United States and not from him. All his rights in the land were dependent on his completion of the four years' possession, but in consideration of what he had done, Congress made his heirs the special objects of its bounty if he died before his own grant had been secured. We attach no importance to the word "descend" as used in this section. In section 4 the word selected to convey substantially the same idea was "entitled." The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the Government instead of him.

"We have not overlooked the fact that by the territorial enactments of Oregon a settler's claim might descend to his heirs as real estate, and that his possessory rights might be disposed of by will; but all these enactments are in conflict with the act of Congress and, therefore, inoperative. The heirs of the settler took only such title as Congress gave them. The territorial government could not add to or take from that grant."

The Court regarded the words "shall be entitled," in section 4, as equivalent to the words "shall descend," in section 8.

And this accords with Davenport *vs.* Lamb, where the surviving husband took one-fifth of the wife's share by force of the donation to the wife by section 4 of the law. The certificate had not issued until after her death.

The case of Hall *vs.* Russell seems to support the proposition that, in case of the death of the wife during the four years, her share or interest would not lapse, but would on full compliance with the law, be disposed of by force of the donation act, on the principle announced and decided in Davenport *vs.* Lamb, above; for the law fully authorizes the surviving settler to do, after his wife's death, everything he could do to perfect the estate, just as if she had survived, and there is no reason why, as an interested survivor and heir, he could not complete the estate of the wife, under section four, as well as his widow, in case of his death, could complete his estate under section eight.

This we understand is the settled construction in the courts of the State of Oregon, and the reason that sustains it appears to be unanswerable; otherwise the fourth and eighth sections would not harmonize.

In *Vance* vs. *Burbank* (101 Reps., 514) the litigation was instituted by parties holding title under Mary Jane, wife of Lemuel Scott. Mary Jane died April 9, 1851, and Scott presented his notification and proofs to the surveyor general October 9, 1852; and claimed 640 acres under settlement July 20, 1848.

The surveyor general declined to issue a certificate because of the conflicting claim of Joel Perkins.

The land involved in the suit was within the lines of conflict, and after long contest, much evidence and repeated appeals, it was awarded to Perkins by the Land Department, and he obtained a certificate including said land and patent thereon. It does not appear that Scott obtained a certificate for any land whatever, and certainly not for any of that involved in the suit.

The Court held primarily that the decisions of the Land Department against Scott for failure to comply with the law as to residence and cultivation was conclusive and would not be reviewed in this Court.

The Court also held that the heirs of the deceased wife of Scott were bound by the result of the contests before the Land Department in the case.

The Court said, at page 521:

"The statutory grant was to the settler; but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband. If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his. In the view we take of the case, it is unnecessary to decide when a settlement *became perfected* so as to establish a claim, or whether, if the wife died before the end of the four years,

her heirs would be entitled to her half when the grant was completed. The question here is whether the wife or her heirs get anything before the husband, or some one for him, proves up the claim.

"The 'settler' is made by the statute the actor in securing the grant. He must notify the surveyor general of his claim. He must occupy and cultivate the land, and otherwise conform to the provisions of the act, and he, or some one for him, must also make the final proof. When this is done, and he becomes entitled to the grant, his wife takes her share in her own right, but up to that time he alone makes the claim. His acts affecting the claim are her acts; his abandonment, her abandonment; his neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The Land Department, until the final proofs are made, knows only the husband. If contests arise, he is the party to be notified. He represents the claim, and whatever binds him binds all interested through him in the questions to be decided."

It was not necessary to decide what would have been the rights of Mary Jane Scott's children if the claim of Lemuel Scott had been successfully proven, but no notice was taken in the decision of the case by this Court of the fact that she died before the end of the four years of residence and cultivation alleged. It was not said that her children could not have anything in any event. It was implied that they *would have taken* had a claim to 640 acres been successfully proven and a certificate obtained.

All these cases seem to us to be radically hostile to the decision of the court below in the present case. The supreme court of Washington Territory has held that the effect of an act of the territorial Legislature of Oregon passed in December, 1852, has defeated the interest of a woman in a donation granted to her by a law of the United States.

This is palpable error, for in the act "To establish the territorial government of Oregon" (9 Stat., 323, section 6) it is provided, "That the legislative power of the Territory

shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; *but no law shall be passed interfering with the primary disposal of the soil.*"

It needs no argument here, in view of this limitation, to prove that the territorial act of divorce, whatever effect elsewhere it may have, can have no effect to defeat or impair a donation by Congress, a grant of the soil by the United States.

THE RIGHT TO A DONATION IS INITIATED BY SETTLEMENT,

and when the donation is secured the title RELATES BACK TO THE DATE OF SETTLEMENT.

This court has not made any decision specifically determining *when* the donee's right attaches to the premises, though in Stark *vs.* Starrs it was said that when the conditions had been completed the title related back to the inception of the right of the settler. We submit that, at least in cases where the incipiency of the claim is subsequent to the grant, the right attaches *from settlement.*

The grant is of a certain quantity of land, 640 acres, one-half to the married settler and one-half to his wife. The right to this quantity seems to vest upon the settlement of the qualified claimant.

The grant being to a "settler or occupant" of the public land; the term "settler" well describes the future claimant, whilst "occupant" better describes one who settled before the grant was made. Said fourth section requires that "the donation shall embrace the land *actually occupied and cultivated by the settler thereon.*" The terms used are similar to those of the pre-emption law in force on the 28th of September, 1850, and the requirements of subsequent notice in writing and proof of residence and cultivation are similar.

And it has uniformly been held that where a *bona fide* settlement under the pre-emption laws has been made and

those laws have *afterward been fulfilled* the right of the claimant relates back to the date of settlement and cuts off intervening claims.

In case of two conflicting donations arising after the grant, it seems quite clear that the *first settler*, all other things being equal, would have the better right. The title would relate back to the date of settlement.

This proposition is and has been accepted by the local courts of Oregon, both the State and United States courts.

Lee *vs.* Summers, 2 Oregon Rep., 266.
Dolph *vs.* Barney, 5 Oregon Rep., 201.
Chapman *vs.* School Dist., 1 Deady, 113.
Lamb *vs.* Davenport, 1 Sawyer, 632.
Adams *vs.* Burke, 3 Sawyer, 416.

The Civil Code of Oregon, enacted in 1862 and republished in 1887, in Par. 332 (otherwise 329) enacts that—

"In an action at law for the recovery of real property, if either party claim the property as donee of the United States, under the act of Congress approved September 27, 1850, commonly called the donation law, or the acts amendatory thereof, such party, *from the date of his settlement* thereon as provided in said acts, shall be deemed to have a legal estate in fee in said property, to continue upon condition that he perform the conditions required by such acts, which estate is unconditional and undefeasible after the performance of such conditions." * * *

[This Oregon statute has been substantially adopted in Washington Territory.

Laws of 1869, p. 133, sec. 504.
Laws of 1877, p. 116, sec. 556.
Code of 1881, p. 126, sec. 556.]

So far, therefore, as the State Legislature can establish the status of the title to such lands, it is declared that the title relates back to the date of settlement, when the condi-

tions have been fulfilled, and this seems in accord with the donation law, irrespective of the question of the dignity of the settler's right while the completion of the requirements of law is in progress.

The donation being of a certain quantity to the settler—"one-half to himself and one-half to his wife, to be held by her in her own right," if Lydia took one-half by direct donation from the United States, then the Territorial Legislature had no power to interfere to disturb her property; and if Maynard fulfilled the law for her as well as for himself her donation from the United States was secured.

This Court, in 18th Wallace, 307, at page 316, in case of Lamb *vs.* Davenport, said:

"The donation act provides that *where the settler has a wife* the quantity of land granted is double that to a single man, and that one-half of it shall be set apart to the wife by the surveyor general, and the title to it vests in her, and that if either of them shall have died before the patent issues the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased."

We strenuously maintain that the divorce, if valid, could have no effect upon the half of the Maynard claim given by law to Lydia *in her own right.* It is not necessary to say that a valid divorce could have no effect under any circumstances; for if Maynard himself had died within a year after marriage with Catharine, she might, under the eighth section, have become entitled to a share with his heirs, but she could have taken nothing from Lydia's half.

There is a marked difference between sections 4 and 8. In section 4 giving to "the settler," if a married man, "640 acres—one-half to himself and one-half to his wife, to be held by her in her own right"—they are described as "*married persons,*" and the one person who outlives the other is called a *survivor*, thus keeping in view the distinctness of their individual shares or interests in the property. Section 8, however provides for "a widow." It is manifest that a woman

may be a "*survivor*," though divorced from a former husband, but cannot be a "*widow*" unless she has lost a *husband* by death. This seems to accord with all the cases cited.

DIVORCE DOES NOT DISTURB PROPERTY RIGHTS WHERE THEY ARE NOT DEALT WITH IN THE PLEADINGS.

As to the effect of the divorce law, if valid, upon the rights of Lydia, it is pertinent to remark that it did not attempt to deal with her donation, and it appears to be settled on principle that it could not have defeated the donation if the attempt had been made. We should not give it, therefore, an effect not only not intended, but impossible.

She had no notice of the proceedings of the Legislature—no day in court to reply or object, and if her property rights could be affected by those proceedings, she was entitled to notice under the fifth amendment of the Constitution of the United States, which provides that—

"No person shall * * * be deprived of life, liberty, or property without due process of law."

The term "due process of law" may in some cases be difficult to apply to facts, but not in this case. We quote a late and leading case on this point:

"It may be stated generally that 'due process of law' requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. *A hearing or an opportunity to be heard is absolutely essential.* We cannot conceive of 'due process of law' without this. In his argument in the Dartmouth College case, 4 Wheaton, 519, Mr. Webster defined due process of law as one which 'proceeds upon inquiry and renders judgment only after trial.'"

Stuart *vs.* Palmer, 74 New York Rep., 191.

"'Due process of law' is not confined to ordinary judicial proceedings, but *extends to all cases* where property is sought to be taken or interfered with."

Cooley on Const. Limitations, 355.

The words "due process of law" were discussed by Justice Curtis, speaking for the United States Supreme Court, in Murray's Lessee *vs.* Hoboken Land Co., 18 Howard, 272. He held that to ascertain their meaning resort must be had to the orderly process of the common law—that they were used in our Constitution as succeeding to and having similar meaning to the words "the law of the land" used in Magna Charta. Speaking of article 5th of amendments to the Federal Constitution, the Court say (p. 276): "*The article is a restraint on the legislative as well as on the executive* and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

This divorce act had no effect on Lydia's share in the land because it took no cognizance of her separate property.

Her half by law was given her "in her own right." It was her separate estate. The point made was decided by the supreme court of Oregon at the February term, 1872, in Groslouis *vs.* Northcut (3d Oregon Rep., 394).

Emerance Groslouis, the plaintiff, was, before September, 1857, the wife of Hubert Petit, who in 1871 obtained a patent for a donation of 640 acres, conveying also to "said Emerance Petit and to her heirs the north half" of the claim.

The action was ejectment, and the defendant set up a purchase at guardian's sale. The decree of divorce had decreed the title to said north half to be in two minor children of her marriage with Petit, but on inspection of the proceedings in divorce (which was for cause) it was found that no mention of the wife's interest in the donation had been made therein. In this case the divorce was granted after the end of the four years' residence, but prior to the full naturalization of Petit.

Held that the decree of divorce was inoperative to affect the title of Emerance Groslouis.

In California the law secures to the wife one-half of the property acquired during marriage, and it was held in Coro-

nel *vs.* Jones *et al.* (39th Cal. Rep., 157) that where a decree of divorce does not determine the disposition of the property held in common, it does not affect the rights of either party therein.

In Texas the law gives to the wife an interest in a homestead acquired during marriage, and it has been held that where a decree granting divorce does not make disposition of the community property a divorced woman is not precluded from recovering her interest.

Whetstone *vs.* Coffey, 48 Texas, 269.
See also Hardin *vs.* Hardin, 38 Texas R., 616.
Newland *vs.* Holland, 45 Texas R., 588.
State *vs.* Fry, 4 Mo., 193.
Gaines *vs.* Gaines, 9 B. Monroe, 295.

It seems to be conceded by the supreme court of Washington Territory that if the interests of Lydia were vested *at the time of the divorce*, the divorce act would be inoperative upon them, as it would be obnoxious to the fifth amendment of the Constitution of the United States, which provides that "no person shall be deprived of life, liberty, or property without due process of law."

The *grant* is to the qualified settler who shall comply with the law, if a married man 640 acres, "one-half to himself, the other half to his wife, to be held by her in her own right."

This gives to her the same as to him an interest in what is done and doing while the claim is in process of completion, and that interest is property which, after fulfillment of the law, may be sold and conveyed. Like a growing crop on land, when ripe it is harvested, and not till then, but it is property before it is ripe. (Barney *vs.* Dolph, 97 U. S. Rep., 652.)

We discern no better right or greater power in a legislature to annul or extinguish that right without "due process of law" before than after compliance with the terms of grant.

If the donation was for 640 acres it was completed as well for Lydia as for David S. Maynard, and it matters not whether or not at the date of divorce the right to the patent had vested. Congress did not propose that divorce should interfere, whether for cause or without cause, but remained silent. The necessary inference is that divorce occurring after a claim is initiated has nothing more to do with a donation than blindness or insanity.

There does not appear to us to be any soundness in the suggestion of the court below, that if the divorce is valid the status of the husband is changed to that of a single man, and he can no longer claim as a "married man." The same idea is contained in Secretary Delano's opinion, that Lydia can claim no rights greater than he (David) possessed at the time of the divorce." * * * "If the estate had not vested at the time of the divorce it is clear that the wife has no title now."

It is enough to say, in reply, that Congress intended and enacted provisions that opened no door to introduce such a proposition. The status of the man as a married man may be changed by death of the wife, but it does not destroy or cut short the donation. There is no provision that when his wife dies the donation shall be reduced.

Neither is there a provision that in case he is divorced, the donation shall be reduced. What the law required of the settler was compliance with its provisions and what it required of his wife was to be married to him at or before the times specified.

The further idea that the husband performs his settlement and cultivation, in whole or in part, in his federal capacity as head of the family and as a prisoner in the bonds of matrimony is particularly absurd, and is answered fully in the same way. It is not required by the law that he should wear those bonds during all the four years, for he may fulfill all of the four years of residence before the 1st of November, 1851, and then marry before December 1st and take up the quantity of 640 acres.

Let us in charity suppose that Maynard entertained some such notion as this, and that as soon as he found himself a "single man" by divorce from Lydia he married Catharine in order to pass muster as a married man for four years, and thus save his claim. Without these circumstances in view it might be said that he was in haste to contract a second marriage on 15th January, 1853, after a divorce December 22, 1852!

Passing strange it is, that after being so profusely married, it should be decided by the executive officers that he was entitled to claim only as a single man.

It cannot be true that Congress intended in case of divorce during the four years to cut short the donation. No such intention is expressed, and the absence of it is emphatic, because it would, if expressed, years in advance of the event, be a positive deduction from the inducements offered to both the settler and the woman who might become his wife, and tend to prevent what the law intended to encourage.

SECOND DIVISION OF THE ARGUMENT ON THE SECOND ASSIGNED ERROR.

The court below erred in deciding that the legislative act of the Territory of Oregon purporting to divorce D. S. and Lydia Maynard was valid.

In proceeding to discuss the second of the principal questions involved in the case we will first meet a point which we anticipate will be made by the defense from the fact that it was urged with apparent earnestness in the courts below, and was stated in the brief as follows:

"The demurrer was properly sustained, because the controlling question before the Secretary of the Interior was *one of fact*, and having been found by him adverse to these plaintiffs his finding cannot be reviewed in any court.

That question was whether Lydia A. Maynard was the *wife* of David S. Maynard at the time this transaction took place."

And in this connection the case of Baldwin *vs.* Stark (107 United States, 463) was cited in support of the proposition that the decisions of the Land Department on questions of fact are not reviewable by the courts.

We are entirely content to accept the exposition of the law in that case, and we feel sure that by the rule therein announced we shall not be debarred from obtaining a hearing upon and a decision of the questions we wish to present, for the Secretary in his decision expressly found that all the facts necessary to establish the Maynard claim had been satisfactorily established.

Whether or not the divorce was legal or effective, it was not the duty or within the jurisdiction of the Secretary to decide, as we have above shown, and his opinion or decision on the validity of the divorce is not binding on Lydia in any judicial proceeding.

He found all the facts in her favor, and then reached an erroneous conclusion as to her rights by the law on the facts found.

We have shown above that this is a case in which the injured party is entitled to the relief sought.

The only question involving any *fact* bearing upon this point, as to whether or not David was legally divorced from Lydia, which the Secretary assumed to pass upon, was as to the passage of the act by the Legislature. For the purpose of this discussion we may concede as a fact that the Legislature did so enact. But the questions at issue are :

Did the Legislature have the power to sever the bonds of matrimony between these parties?

Is the act valid or of any effect for any purpose?

In the first place, we invite attention to the act itself. Briefly and pointedly, without preamble or recital, it declares

"That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are hereby, dissolved." Simply this and nothing more. On the face of it this act appears to be harsh and despotic and in violation of the fundamental principles of the American form of government.

The supreme court of Washington Territory in its opinion in this case uses this language:

"The first inquiry, then, is as to the power of the Legislature to pass a special act of divorce, for this power being conceded the fact that it did pass such an act will raise a conclusive presumption that it was rightfully passed, and that just cause therefor was shown to the satisfaction of the said Legislature." (See Record, p. 20.)

If this is a sound rule it must necessarily strongly tend to establish the proposition that the Territorial Legislature had no power to divorce the parties by a special act, because upon the marriage relation *rights* depend, rights which the parties can maintain in the courts of the country, and any legislative act which assumes in a special case to deprive a particular person of the privilege enjoyed by all others, of appealing to the courts for the maintenance of vested rights, is despotic, and in this country, where equality before the law is a cardinal principle of government, intolerable. The judicial tribunal that conclusively assumes that every act of the Legislature is rightful and valid because it has been passed abdicates its own jurisdiction and is not a court of judicature.

In the opinion the court next proceeds to assume that in 1852, at the time of the passage of this divorce act, such acts were, in the light of all adjudications upon the subject, held to be legal. This is found in the following paragraph of the opinion:

"That must be considered as legal and binding which is recognized and enforced by the courts; and if this be so,

then in 1852, when this act was passed, such acts, examined in the light of all the adjudications upon that subject, must be held to be legal and within the legislative power, and this, too, despite the fact that the powers of government under which such acts had been passed and said adjudications had, had been by the sovereign power distributed into the legislative, executive, and judicial branches." (See Record, p. 20.)

Does the court by this language mean to invoke the rule of *stare decisis?* Does it mean to base its decisions upon previous adjudications of the question by the courts having jurisdiction in the Territory or State of Oregon and the right to pass upon the validity of the acts of its Legislature? To both questions the answer must be, Certainly not; because none of the courts, Territorial, State, or Federal, having jurisdiction in Oregon, have either before or since 1852 upheld a legislative divorce.

It is, therefore, to the decisions of the courts of other jurisdictions, rendered under circumstances which could not affect a decision in Oregon, that deference is yielded. But even in this the court has erred in thus assuming that all or even a majority of the decisions of the courts in this country, either prior to or subsequent to 1852, have in fact affirmed the validity of Legislative divorces.

Starr *vs.* Pease (8 Connecticut, 541), decided in 1831, is usually cited as the leading case on the side of the validity of legislative divorces. But the divorce in question in that case was not legislative, but judicial, although it was granted by the Legislature. The record shows that the Legislature in that case acted in a judicial capacity and proceeded strictly according to judicial forms, just as Parliament always has in granting divorces. (See the divorce act recited in the report of the case.)

That decision does not maintain that the granting of a divorce is a legislative function, or that the marriage tie of a particular couple is a *rightful* subject of legislation, but it

does hold that prior to the adoption of the State constitution of 1818 the Legislature of Connecticut possessed all power, legislative and judicial, with only a few limitations; that the constitution of 1818 is not a grant of power, but a limitation of the powers previously belonging to the several branches of the Government; that the Legislature was not by that constitution divested of the power, which previously belonged to it, of granting divorces. All this appears by the following extract from the opinion in the case:

"A further objection is urged against this act, viz., that by the new constitution of 1818 there is an entire separation of the legislative and judicial departments, and that the Legislature can now pass no act or resolution not clearly warranted by that constitution; that the constitution is a grant of power and not a limitation of powers already possessed, and, in short, that there is no reserved power in the Legislature since the adoption of this constitution. Precisely the opposite of this is true. From the settlement of the State there have been certain fundamental rules by which power has been exercised. These rules were embodied in an instrument called by some a constitution, by others a charter. All agree that it was the first constitution ever made in Connecticut, and made, too, by the people themselves.

"It gave very extensive powers to the Legislature, and left too much, for it left everything almost to their will. The Constitution of 1818 professed to, and, in fact, did, limit that will. It adopted certain general principles, by a preamble, called *a declaration of rights;* provided for the election and appointment of certain organs of the government, such as the legislative, executive, and judicial departments, and imposed upon them certain restraints. It found the State sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the Constitution of the United States nor opposed to the sound maxims of legislation, and it left them in the same condition, except so far as limitations were provided."

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Wright *vs.* Wright (2 Maryland, 429), decided in Decem-

ber, 1852, and Cronise *vs.* Cronise (54 Pennsylvania State, 255), decided in 1867, are very similar to the case of Starr *vs.* Pease. They hold that in those two States the Legislatures, having prior to the adoption of their constitutions possessed power to grant divorces, still have the same power, except as curtailed or limited by those instruments. In the latter case it was held that the Legislature could not grant a divorce in any case in which the courts would have jurisdiction.

In Bingham *vs.* Miller (17 Ohio, 445), decided in 1848, the court emphatically decided the granting of divorces to be a judicial and not a legislative function, and that the Legislature had no power to grant a divorce in any case but out of regard for supposed unpleasant consequences to people not parties to the suit if effect should be given to the law, the court gave judgment as if the law were the reverse of what the court found.

Crane *vs.* Meginnis (1 Gill and Johnson, 463), decided in 1829, was a suit to recover alimony awarded by an act of the Legislature granting a divorce to the wife. Judgment was given for the defendant. The concluding paragraph of the opinion is as follows:

"In acting upon this case we wish to be understood to decide nothing but the points before mentioned; only to adjudge that the exercise of judicial power is in opposition to the Constitution, and that the enactment of the third section of the act of 1823 was an exertion of the judicial power and is necessarily a void act."

Townsend *vs.* Griffin (4 Harrington, Del.), decided in 1846, was a suit to enforce a judgment lien by creditors of the husband against the wife's land after a divorce by the Legislature of Delaware. The court refused to give plaintiffs the relief sought, but having doubts as to the validity of the divorce act refrained from deciding that question.

In Gaines *vs.* Gaines (9 B. Monroe, Ky., 295), decided in 1848, pending a suit for a divorce and alimony, the Legis-

lature granted a divorce at the husband's instance. After the husband's death the wife claimed dower and the wife's share of slaves and personal property, and thus brought in question the validity of the divorce act.

The court declined to decide the question as to its effect upon the persons, but held it to be inoperative to divest property rights, even the inchoate right of dower.

In Adams *vs.* Palmer (51 Maine, 480), decided in 1863, the court held a divorce granted by the Legislature of Maine in 1846, with the consent of both parties, each of whom soon afterwards contracted new marriage relations, to be valid.

In Cabell *vs.* Cabell (1 Metcalf Ky., 319), decided in 1858, the divorce drawn in question was granted by the Legislature with the consent of both parties. Held valid.

Maguire *vs.* Maguire (7 Dana, 183), decided in 1838, has been often cited as a case upholding the validity of a legislative divorce, but the only point actually decided in that case was that under the then existing laws of Kentucky the courts had no jurisdiction of suit by a wife for a divorce against her husband, he being at the time not a resident of the State and absent therefrom.

Although these cases are sometimes cited as upholding the doctrine that divorces in this country by special legislative acts are constitutional and valid, they do not support that doctrine, but rather bear in the opposite direction. In connection with some of these cases Judge Story has said "that marriage, though it be a civil institution, is understood to constitute a solemn obligatory contract between the parties; and it has been *arguendo* denied that a State Legislature constitutionally possesses authority to dissolve that contract against the will and without the default of either party." And in a note on this passage Judge Cooley adds: "Such has been the view of the State courts in general."

2 Story on the Constitution, 4th edition, § 1397.

State *vs.* (Fry 4 Missouri, 120), decided in 1835, was a suit in the name of the State to the use of Gentry and wife against a guardian of the wife's estate.

The defendant pleaded in defense a special act of the Legislature divorcing the plaintiffs. A demurrer to this plea was sustained by the court on the ground that the act was void.

The report of the case contains the exhaustive and able arguments of counsel on both sides, showing the case to have been well presented. Able opinions were rendered by two of the justices, thoroughly discussing all the points bearing upon the validity of such acts and holding them to be void.

The case has since been followed and reaffirmed in that State by Bryson *vs.* Campbell, 12 Missouri, 498, decided in 1849; Bryson *vs.* Bryson, 17 Missouri, 590, decided in 1853, and by Bryson *vs.* Bryson, 44 Missouri, 232, decided in 1869.

Clark *vs.* Clark (10 New Hampshire, 380, decided in 1839), is a strong decision holding that marriage is a contract indissoluble except for misconduct sufficient to work a forfeiture of rights, and that a divorce can be granted only in a regular judicial proceeding. The following extract from the opinion shows the position of that court:

"From the nature of the contract and the manner in which it affects the public interest, it has been deemed competent for the Government to provide for this dissolution of it, on the application of either party, against the consent of the other; and a contract of marriage is understood to be subject to this power. It has been said that it 'may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good or justice to both or either of the parties will thereby be subserved.' If by this it is intended that the sovereign power may dissolve a marriage regularly contracted and celebrated according to law without the consent of either of the parties, and without any breach of contract, the proposition is not admitted."

It is to be noted that the alleged divorce now under consideration was by an act of a Territorial Legislature, and there is a broad distinction, therefore, between this case and all the cases arising under legislation by States.

The following is a list of the cases we have found in which the validity of a divorce granted by special act of a Territorial Legislature have come in question in other jurisdictions:

Ponder *vs.* Graham, 4 Florida, 23; decided in 1851.
Levins *vs.* Sleator, 2 Green (Iowa), 604; decided in 1850.
Chouteau *vs.* Magennis, 28 Missouri, 187; decided in 1859.
Estate of Higbee, deceased, 5 West Coast Reporter, p. 505; decided in 1885.

A majority of these cases—that is, all of them except the Iowa case—deny that a Territorial Legislature has the power to grant a divorce, and we invite a comparison of the opinions in these different cases. It will be found that the Iowa decision is based upon premises and assumptions which must have been avoided if more than a most careless or superficial examination of the subject had been given by the court, and the sentiments expressed are un-American throughout, while the opinions in the Florida, Missouri, and Utah cases are based upon sound and incontrovertible arguments, and express only the most wholesome American ideas of government.

We have not cited the Washington Territory case of Maynard *vs.* Valentine (2d Washington Territory Reps.) because the decision in this case is a duplicate of that. Both were rendered by a divided court, and the second referred to the first as a respectable authority. We deny it any authority and claim that practically it is now under review on this appeal.

We propose to place the Utah case in opposition and pre-

sent it as overbalancing this case in soundness of reasoning. Moreover, it was made by an unanimous court.

We subjoin a memorandum of the case. Sophia E. Higbee, the complainant, sued for her share and was entitled to distribution in the estate of Lyman P. Higbee, if she was his lawful wife at the time of his decease. She had intermarried with him in 1866, and on December 28, 1874, an act was passed by the territorial Legislature of Idaho identical in substance and nearly so in form with the act now called in question. Sophia was at the time absent from the Territory in California, where she had been sent by him for her health, but where, after a year, he sent her no means of support. She did not hear of the divorce until in 1876.

The same case is reported in The Pacific Reporter, vol. 5, p. 693.

The question under consideration being the validity of the divorce, the court said:

ZANE, *C. J.:*

"To decide this question, it is necessary to determine whether the divorce was within the grant of the legislative power to the Territory of Idaho. The Federal Government is one of enumerated and delegated powers, and possesses no others except such as are necessary to the exercise of those expressed. The second clause of the third section of the fourth article of the Constitution of the United States is: 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.' 'No one,' says Judge Story, 'has ever doubted the authority of Congress to erect territorial governments within the territory of the United States under the general language of this clause' (2 Story on Const., sec. 1325).

"Rules and regulations in a legal sense mean laws. Blackstone says that 'municipal law is a rule of civil conduct prescribed by the supreme power in a State.' A divorce is not a rule or regulation. 'The divorce act is a judgment, though not pronounced by a court.' If it has any effect, it is the dissolution of the bonds of matrimony between husband and

wife, a decree which terminates the rights and duties of the marriage relation. It is confined to the parties to the marriage, and, therefore, cannot be a rule or regulation. Congress unquestionably has the power to enact laws with respect to marriage and divorce in the Territories—to protect the former and to specify the causes for the latter and the mode to be pursued in obtaining the latter; but, so far as we are advised, Congress has never exercised or claimed authority to grant divorces."

* * * * * * *

"The Legislature of the Territory of Idaho attempted to try petitioner's case without evidence, and, at one blow, to make the law, and the decision, which severed all her rights as wife. By the common law, marriage is for life, and indissoluble except for cause. In the case of Smith *v.* Smith (13 Gray, 209) Shaw, C. J., said: 'Marriage is undoubtedly a contract, but it is a contract sanctioned by law, controlled by considerations of public policy, vital to the order and harmony of social life, and in its nature indissoluble except by the violation of duty on the one part, to be taken advantage of in a special manner provided by law on the other.'

"From the point of view from which we are considering this case, it is immaterial whether marriage is held to be a contract or a status. In either case the rights which the relation affords and the duties which it imposes are equally under the protection of the law."

* * * * * * *

"Yet it does not follow that the individual rights of the parties may be disregarded because the public have an interest in the institution of marriage. Both classes of interests exist together and both should be secured and protected. All persons, with respect to their marital rights, are equal before the law, and the State must extend to all equal, exact, and even-handed justice. Therefore, the act of the Legislature of Idaho cannot be sustained without holding that the granting of a divorce is a rightful subject of legislation, without violating that great principle of equalness upon which all justice and all equity repose, and without denying to the petitioner the benefit of the law of the land and refusing her a day in court and a right to a fair trial.

"The act cannot be upheld upon principle. The authorities are conflicting. The constitutions of thirty-one States forbid legislative divorces. None have ever been granted in this Territory, and but few in any of the Territories. Neither of the parties to the marriage in question ever married again, and no serious consequences are likely to follow from holding that the act in question is void.

"The decree of the lower court is reversed and the cause remanded, with direction to enter a decree in harmony with this opinion.

"TWISS, A. J., and EMERSON, A. J., concurred."

We claim that we have now shown that the decided weight of authority is against the proposition that the granting of divorces is a legislative function, and that the court below erred in assuming, as it did, that the courts of the country, by numerous decisions and constant practice, have established the contrary doctrine. In summing up we find that, aside from mere voluntary side remarks in the decision of cases in which the question was not necessarily involved, this question first began to receive attention in the appellate courts in 1829, when the supreme court of Maryland, in Crane *vs.* Meginniss, denied the power of the Legislature to award alimony. Next, in 1831, the supreme court of Connecticut affirmed the validity of a divorce granted for cause duly established upon a regular trial by the Legislature of that State acting in that matter judicially. In 1835 the supreme court of Missouri denied the power of the Legislature of that State by special act to grant a divorce in any case, and in 1839 a similar decision was rendered by the supreme court of New Hampshire.

In 1846 the supreme court of Delaware, in a suit in equity, expressed grave doubts as to the validity of a divorce granted by the Legislature of that State, but disposed of the case without deciding the point. In 1848 the supreme court of Kentucky denied that the inchoate right of dower could be cut off or at all affected by a legislative act of divorce;

and the supreme court of Ohio denied that the Legislature of the State had the power to grant divorces, although it gave a judgment in the case contrary to its decision. In 1849 (in Jones *vs.* Jones, 12 Pa. St., p. 350), the supreme court of Pennsylvania expressed strong doubts as to the granting of divorces. In 1850 the validity of a divorce by the Territorial Legislature of Iowa was upheld by the supreme court of that State. In 1851 a decision counter to the last mentioned was rendered by the supreme court of Florida.

These are the decisions which the court below assumed had settled the law at the time the Legislature of Oregon Territory passed the act now called in question.

It is to be noted that prior to the passage of the organic act of Oregon Territory, in 1848, no divorce granted by a Territorial Legislature had been upheld in any reported case.

There are many other cases containing a vast amount of *obiter dicta* for and against the validity of legislative divorces, but as the point was not necessary to be considered in the decisions rendered, they cannot be regarded in the light of authority.

The American authors and commentators who have discussed the question, except Mr. Bishop, condemn the practice and deny that divorce is a rightful subject of legislation. Judge Cooley says that "the general sentiment in the legal profession is against the rightfulness of special legislative divorces."

> Cooley on Constitutional Limitations, 4th edition, p. 113. (Marginal.)

That the American people generally concur with the legal profession on this subject is evidenced by the fact that most of the State constitutions expressly prohibit special legislative divorces.

In 1826 Congress annulled several special acts of divorce passed by the Legislature of the Territory of Florida (4

Statutes at Large, p. 167, § 14), whereupon Chancellor Kent remarks:

"This is an instance of a strong national condemnation of the practice of granting legislative divorces."

2 Kent's Commentaries, 4th edition, p. 105, note *a*.

And his opinion of the action of Congress was concurred in by the supreme court of Florida in the case of Ponder *vs.* Graham (4 Florida, p. 44).

But even if the authorities were otherwise and practically unanimous, as the court below supposed, we maintain that the practice of granting divorces by special legislative acts, without the consent or fault of or notice to either party, is wrong; that all decisions to the contrary are erroneous, and that error oft repeated does not thereby become right, especially when all the time met by counter-decisions. Moreover, the question is to be determined by the law of Oregon, and not by the law of any of the States.

Although the power to grant divorces in England belongs to and has been exercised by Parliament, it does not follow that similar power belongs to the Legislatures of the States; and although the latter may have the power, it does not follow that similar power is possessed by the Legislatures of any of the Territories, for, as we shall show presently, the latter have only the powers expressly delegated to them by Congress. This point is made clear in Ponder *vs.* Graham, 4 Florida, p. 33. (See, also, Kilbourn *vs.* Thompson, 103 United States, p. 183.)

Leaving the authorities and viewing the question in the light of reason alone, we next observe that no good reason to uphold the validity of a special act of the Legislature severing the marriage bond of a particular wedded pair without the consent of one of the parties, who has been guilty of no fault in the matter, has ever been discovered, but, on the contrary, there are unanswerable arguments against the validity of such a proceeding by the Legislature of a Terri-

tory. We shall limit our discussion to the powers of Territorial Legislatures.

In the first place, let us consider the temporary expedients called territorial governments. What are they? Are they endowed with the attributes of sovereignty? Certainly not, for the people subject to their rule have no voice in framing them; they are not permanent in character; they are mere dependencies of the National Government. Their position relative to the nation is analogous to that of counties or other municipal governments to the respective States.

In the decision of this Court in the case of the National Bank of Brunswick *vs.* County of Yankton (101 United States, p. 133), the position and character of the Territorial governments are thus defined:

"The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations."

From this it follows that the organic act of Oregon Territory differs essentially from the constitutions of Connecticut, Pennsylvania, and the other States in this, that instead of being merely a limitation upon the powers of the Legislature it is a *grant* of power, and is the only source of power in the Legislature.

The act of the Oregon Legislature declaring the bonds of matrimony between Lydia Maynard and her husband dissolved being a special act for a particular case, and, if valid, its effect being to divest her of her rights as a married woman against her will and without any cause or reason, except that such was the will of the Legislature, was an attempt on the part of the Legislature to exercise an extraordinary power. Such exercise of power is forbidden by the principles of the common law and *Magna Charta* by which constitutional grants of power are to be interpreted, and the act is

unconstitutional, unless the will of the sovereign to vest the power in the Legislature to do such act clearly appears. No inference in favor of the grant of such power will be indulged; nor will it be deemed within any grant of power made in general terms.

Cooley on Constitutional Limitations, 175, 176, 188.

Congress has never by express provision vested in any Territorial Legislature power to grant divorces or pass special laws to affect individual cases. If such power was ever granted to the Legislature of Oregon Territory, it must have been by necessary implication. By its organic act, the Territory was provided with courts as well as an executive and a Legislature and all the machinery necessary for a sound, efficient, and free government; hence there could be no controlling necessity for the exercise of this species of power by the Legislature, for the marriage relation and status of the inhabitants could be as well regulated by general laws, and the courts were provided to adjudicate upon the rights of parties.

The entire grant of legislative power is contained in the first clause of § 6 of the organic act of the Territory and is in these words: "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

9 Statutes at Large, 323.

Section eight of the organic act of Oregon Territory vests the judicial power of the Territory in the courts and justices of the peace therein provided for.

9 Statutes at Large, 323.

In accordance with the established principles of government and rules of constitutional construction in this country, this provision must be understood as vesting the *whole judi-*

cial power in the courts and justices of the peace, and as prohibiting the exercise of judicial power by either of the coordinate branches of the Territorial government.

Cooley on Constitutional Limitations, 87, 95, 174.
1 Kent's Commentaries, 291.
Story on the Constitution, § 1592.

A divorce cannot be *rightfully* granted in any case without cause. To ascertain and declare the existence of sufficient cause in a particular case is not a legislative but a judicial function, and judicial power is not given to the Legislature, but is vested in the courts by the section of the organic act above cited.

By the fourteenth section of the organic law of Oregon Territory the inhabitants thereof were granted all the rights, privileges, and advantages secured to the people of the Northwest Territory by, and subjected to all the conditions and restrictions and prohibitions of, the articles of compact contained in the ordinance of 1787.

That ordinance provides that, "in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have any force in the said Territory that shall in any manner interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed."

General Laws of Oregon, p. 59.

Lydia A. Maynard, at the time of the passage of the act, was not within the Territory of Oregon, and being separated from her husband, in fact without her fault, she was not affected by his change of domicile, but remained as he left her, domiciled in Ohio. Such being the case, the act passed without notice to her and without her consent is void as to her.

Cheely *vs.* Clayton, 110 United States, 705.
People *vs.* Baker, 76 New York, 78.

The supposed act of divorce, being void for want of power in the Legislature, could acquire no vitality or become valid by the mere failure of Congress to disapprove and annul it.

Congress had doubtless adjourned on March 2, 1853, before a copy of the laws reached Washington. Lydia did not hear of the transaction for over six months after its date, and Catharine was married to Maynard on the 15th of January, 1853. These facts can give no respectability to the enactment; they are rather a reproach to the Legislature, who, if they could pass an act divorcing Lydia without fault by her and without notice to her, might have divorced themselves from their own wives and returned to their homes for the Christmas holidays as single men, or with new wives—for the loss of a companion by legislative enactment is not supposed to inflict upon the relict a very long and painful period of grief.

It will not do to impute to all the bad legislation of the Territories not affirmatively disapproved by Congress the sanction of congressional approval.

Congress has exercised its power of annulling territorial statutes but sparingly, and there are many reasons for this other than a deliberate intention to acquiesce. Members of Congress have neither the time nor inclination to study the different enactments of the Territories or perform the amount of labor necessary to the passage of bills to annul the bad ones; and it is preferable to leave the people to legislate for themselves so long as the courts are open and free to pronounce void all such acts as are in violation of the Constitution or laws of the United States and such as the Legislatures have no power to pass.

The courts have pronounced many territorial statutes void long after they have taken effect, although Congress had failed to annul them. We will cite an instance of recent occurrence: In 1883 the Legislature of Washington Territory passed an act extending the elective franchise to women. Under this act women voted, were elected to and filled public

offices, and served as grand and petit jurors, and judgments were rendered upon their presentments and verdicts; and afterwards, in 1887, the supreme court of Washington Territory, in the case of Harland *vs.* The Territory (13 Pacific Reporter, 453), held this statute void for want of a good title to express its object, as required by the organic act of the Territory, although Congress had failed to annul the act. This decision was rendered by a divided court, but it has since been reaffirmed by a unanimous decision of the court as now constituted.

In Dunphy *vs.* Kleinsmith and Duer (11 Wallace, 610), this Court, in effect though not in words, held the civil practice act of Montana void, although it had been in operation in that Territory several years, and had not been disapproved by Congress.

See also Ponder *vs.* Graham (4 Florida, p. 44), in which case it is shown that even by an affirmative approval Congress could not make such an act valid, because Congress has no judicial power except as specified in the Constitution, and could not itself grant a divorce. This argument is conclusive on the point, and it is supported by the decision of this Court in Kilbourn *vs.* Thompson (103 United States, p. 192).

This latter case also contains a perfect answer to the suggestion of the court below, that the proceedings of the Legislature in a matter affecting individual rights cannot be reexamined in the courts at the suit of the injured party.

The supreme court of Massachusett, in its decision in the case of Burnham *vs.* Morrissey (14 Gray, 226), makes this emphatic statement:

"Living under a written constitution, no branch or department of the Government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them whether the powers of any branch of the Government, and even those of the Legislature, in the enactment of laws have been exercised in conformity

to the Constitution, and if they have not to treat their acts as null and void."

And this statement, with other matter, is quoted and approved by this Court in its opinion in the case referred to on page 199.

In conclusion, we submit that this was an act of gross injustice to a blameless woman and her children, and the judgment of the court below sustaining it ought to be reversed.

HENRY BEARD,
C. H. HANFORD,
Attorneys for Appellants.

APPENDIX.

EXTRACTS FROM THE STATUTES.

From the Oregon Donation Law, approved September 27, 1850, 9th Stat., 496, et seq.

"SEC. 4. *And be it further enacted*, That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one-half to himself and the other half to his wife, to be held by her in her own right; and the surveyor general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before the patent issues, the survivor and *children or heirs* of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon: *Provided*, That no alien shall be entitled to a patent to land, granted by this act, until he shall

produce to the surveyor general of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but if any alien having made his declaration of intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs-at-law, or pass to his devisees, to whom, as the case may be, the patent shall issue; *Provided further*, That in all cases provided for in this section the donation shall embrace the land actually occupied and cultivated by the settler thereon: *Provided further*, That all future contracts by any person or persons entitled to the benefit of this act for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor shall be void: *Provided further, however*, That this section shall not be so construed as to allow those claiming rights under the treaty with Great Britian relative to the Oregon Territory to claim both under this grant and the treaty, but merely to secure them the election and confine them to a single grant of land.

"SEC. 5. *And be it further enacted*, That to all white male citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said Territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three; and to all white male American citizens not hereinbefore provided for, becoming one and twenty years of age, in said Territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provision of this law, there shall be, and hereby is, granted the quantity of one-quarter section, or one hundred and sixty acres of land, if a single man; or if married, or if he shall become married within one year from the time of arriving in said Territory, or within one year after becoming twenty-one years of age as aforesaid, then the quantity of one-half section, or three hundred and twenty acres, one half to the husband and the other half to the wife in her own right, to be designated by the surveyor general as aforesaid: *Provided always*, That no person shall ever receive a patent for more than one donation of land in said Territory in his or her own right: *Provided*, That no mineral lands shall be located or granted under the provisions of this act.

"SEC. 6. *And be it further enacted*, That within three months after the survey has been made, or where the survey has been made before the settlement commenced, then within three months from the commencement of such settlement, each of said settlers shall notify the surveyor general, to be appointed under this act, of the precise tract or tracts claimed by them respectively under this law, and in all cases it shall be in a compact form; and where it is practicable so to do, the land so claimed shall be taken as nearly as practicable by legal subdivisions; but where that cannot be done, it shall be the duty of the said surveyor general to survey and mark each claim with the boundaries as claimed, at the request and expense of the claimant; the charge for the same in such case not to exceed the price paid for surveying the public lands. The surveyor general shall enter a description of such claims in a book to be kept by him for that purpose, and note, temporarily, on the township plats, the tract or tracts so designated, with the boundaries; and whenever a conflict of boundaries shall arise prior to issuing the patent, the same shall be determined by the surveyor general: *Provided*, That after the first of December next, all claims shall be bounded by lines running east and west, and north and south; *And provided further*, That after the survey is made, all claims shall be made in conformity to the same, and in compact form.

"SEC. 7. *And be it further enacted*, That within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then, within twelve months from the time the settlement was commenced, each person claiming a donation right under this act shall prove to the satisfaction of the surveyor general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of the commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the surveyor general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the Commissioner of the General Land Office,

setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said surveyor general shall return the proof so taken to the office of the Commissioner of the General Land Office, and if the said Commissioner shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof.

"SEC. 8. *And be it further enacted*, That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs-at-law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent."

On 14th February, 1853, an act amending said act of 27th September, 1850. (10 Stat., 158.)

Section 6 of said amendatory act is as follows:

"That every person entitled to the benefit of the fourth section of the act of which this is amendatory, who was resident in said Territory on or prior to the first of December, eighteen hundred and fifty, shall be and hereby is required to file with the surveyor general of said Territory, in advance of the time when the public surveys shall be extended over the particular land claimed by him, where those surveys shall not have been made previous to the date of this act, a notice in writing, setting forth his claim to the benefits of said section, and citing all required particulars in reference to such settlement claim; and all persons failing to give such notice on or prior to the first of December, eighteen hundred and fifty-three, shall be thereafter debarred from ever receiving any benefit under said fourth section."

125-190

125-195

Supreme Court of the United States.

OCTOBER TERM, 1887.

HENRY C. MAYNARD, *et al.*,
vs.
WILLIAM C. HILL, *et al.* } No. 194.

Brief for Appellees.

WALTER H. SMITH,
Att'y for Appellees.

R. O. POLKINHORN, PRINTER.

Supreme Court of the United States.

OCTOBER TERM, 1887.

HENRY C. MAYNARD, *et al.*,
vs.
WILLIAM C. HILL, *et al.* } No. 194.

APPEAL FROM THE SUPREME COURT OF WASHINGTON TERRITORY.

Brief for Appellees.

ARGUMENT.

I am content with the statement of the case made in the brief of counsel for appellants.

Fifteen years ago I was the legal adviser of the Interior Department, and considered the Maynard case, and prepared the decision made by Secretary Delano, and now brought forward for review in this court. The Secretary then held that the four years of settlement and cultivation were conditions precedent to the vesting of title; that the act of the Territorial Legislature, divorcing the parties, was a valid act and operated to dissolve the marital relations between them, and that the said Lydia had no interest

in the premises, because she ceased to be the wife of the said David before the period of settlement and cultivation had expired. I shall endeavor, in this argument, to satisfy this court that his conclusions were correct, and that the court below was right in sustaining the demurrer to the amended complaint.

1. The demurrer was properly sustained, because the controlling question before the Secretary of the Interior was *ore of fact*, and having been found by him adverse to these plaintiffs, his finding cannot be reviewed in any court. That question was whether Lydia A. Maynard was the *wife* of David S. Maynard at the time this transaction took place. He found that she was not. I claim that this finding was conclusive upon these plaintiffs. Their mother, through whom they claim, was a party to the proceeding. The record shows that she was a party, and was present before the Register and Receiver, asserting her claim to the lands now in controversy. If she were bound, they were bound, being privies in blood and estate. That all parties are bound by the decision of the Secretary, upon questions of fact, has been repeatedly decided by this Court, and must be conceded to be settled law. I call attention to the last decision, because it states the rule so clearly as to leave no room for doubt or misapprehension, and because the case was much like the one now under consideration. It is that of *Baldwin* v. *Stark*, 107 U. S., 463. Mr. Justice MILLER, in delivering the opinion of the court, said:

"This is a writ of error to the Supreme Court of the State of Nebraska. The substance of the original bill in the State court is, that in a contest for the

right to enter a tract of land between Stark and Van Pelt, before the Land Department, the Secretary of the Interior erroneously decided in favor of Van Pelt, to whom a patent was issued ; and the prayer of the bill is, that Baldwin, who holds under Van Pelt shall be decreed to hold the title in trust for Stark, and convey it to him, and be enjoined from prosecuting further an action of ejectment against plaintiff ; which he has commenced for the land in controversy. * * The record shows that upon all the questions involved the Department decided in favor of Stark except one, which was that he was disqualified to make the pre-emption claim he was then prosecuting by reason of having previously exercised that right in regard to other lands. Whether he had thus made a filing of a former declaratory statement was a question of fact much contested before the Department, in regard to which Stark himself was sworn, as were also several other witnesses, and the record of the alleged filing was also produced. On all this evidence the Commissioner of the General Land Office decided that he *had* filed the previous declaration and was, therefore, disqualified as a pre-emptor of the land now in controversy. On appeal to the Secretary of the Interior this decision was affirmed, and Stark's claim was rejected, and Van Pelt's allowed, and the patent issued to him.

"The Supreme Court of Nebraska holds that the Land Department decided this question of fact erroneously, and that Stark never filed or made the former declaratory statement that he was a qualified pre-emptor for the land patented to Van Pelt, and decrees a conveyance to him by Baldwin, of the legal title vested by the patent. *Baldwin* vs. *Stark*, 7 *Nebraska*, 114.

"It has been so repeatedly decided in this Court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that department *the decision is conclusive*

everywhere else, as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition have been practiced on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, Courts of Equity may give relief, but they are not authorized to re-examine into a mere question of fact, dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. *Johnson* vs. *Towsley*, 13 Wall. 36; *Gibson* vs. *Chouteau*, ib. 102; *Marquery* vs. *Frisbie*, 101 U. S., 475; *Shipley* vs. *Cowan*, 91 U. S., 330.

"The case before us is a simple re-examination by the Supreme Court of Nebraska of the evidence on which the Commissioner of the Land Office and the Secretary of the Interior decided that Stark had made a prior declaratory statement for the pre-emption of other land, and a reversal of that decision. 7 Nebraska, 114. * * * * The decree of the Supreme Court of Nebraska is reversed."

This decision must be regarded as conclusive of this case, if the question above considered was one of fact.

But it may be argued that it was not purely one of fact, but a mixed one of law and fact depending, for its solution, upon the validity of the legislative divorce. If this Court shall be of that opinion, then I maintain—

(2.) That the divorce was legal and valid, and that the Secretary correctly so decided.

Had the legislature the power to grant the divorce?

The act of Congress gave it legislative power extending to "all rightful subjects of legislation, not inconsistent with the Constitution and Laws of the United States." 9 Stat., § 6, page 325.

This act was passed on the 14th of August, 1848, and it becomes important to inquire what was *then* generally considered as "rightful subjects of legislation." Was the granting of a divorce one of such "rightful subjects?"

It seems to me that in the light of long-established and almost universal legislative action and of a nearly unbroken current of opinion by text writers and legal tribunals, the question is easily answered.

It is familiar doctrine that our ancestors brought with them, in the early settlement of this country, the common law and the legal usages and remedies recognized and adopted in England. Among them was the principle that legislative bodies were clothed with the power to grant a divorce. That principle was actedupon by Parliament as early as 1669, in the celebrated case of Lord Ross. McQueen's Practice House of Lords, 471, 1 Bishop Mar. & Divorce § 667, 6th Ed. And has been from that day to the present.

Bishop, 1 Mar. & D., § 663, says:

"When this country was settled, it is seen, dissolution of valid marriage was a legislative function in the mother country. Quite, of course, therefore, the practice came into use here. In later years, it has very much, not entirely, faded away."

And again, do., § 664:

"The fact that, at the time of the settlement of this country, legislative divorces were common, competent and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly

created by a written constitution binding on the legislative power."

Cooley, Const. Lim., 4th Ed., p. 132, says:

"There is another class of cases in which it would seem that action ought to be referred exclusively to the judicial tribunals, but, in respect to which, the prevailing doctrine seems to be that the legislature has complete control, unless specially restrained by the State constitution. The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the Colonial and State legislatures have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases."

Kent, 2 Com., 98, says:

"During the period of our Colonial government, for more than one hundred years preceding the revotion, no divorce took place in the colony of New York, and for many years after New York became an independent State, there was not any *lawful mode* of dissolving a marriage in the lifetime of the parties, but by a special act of the legislature. * * * At last the legislature, in 1787, authorized the Court of Chancery to pronounce divorces *a vinculo* in the single case of adultery, upon a bill filed by the party aggrieved."

And again, 2 Com., 105, note *c.*:

"In the States, generally, the legislature may, in their discretion, grant divorces in extraordinary cases, and they occasionally exercise the power."

Blackstone, 1 Com., 441, says:

"By the English law a marriage, valid in its commencement, cannot be dissolved, for any cause, without an act of Parliament."

In *Crane* vs. *Meginnis*, 1 Gill & Johns., 474, the Court said:

"Divorces in this State, from the earliest times, have emanated from the General Assembly, and can now be viewed in no other light than as regular exertions of the legislative power."

In *Cronin* vs. *Cronin*, 54 Penn. State, 260, the Court said:

"Special divorce laws are legislative acts. This power has been exercised from the earliest period by the legislature of the province, and by that of the State, under the constitutions of 1776 and 1790. The continual exercise of the power, after the adoption of the constitution of 1790, cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it, but it stands upon higher ground of contemporaneous and continued construction of the people of their own instrument."

In *Noel* vs. *Ewing*, 9 Ind., 53, the Court said:

"Divorces are not governed by the rules which govern the recission of other contracts. They are acts of sovereignty, dictated by considerations of public policy, on subjects entirely within State control and municipal regulation. It would be hazardous to now declare these acts unconstitutional. The practice has been too extensive and long continued,

and on any but a clear question the consequences would be too serious. The courts will therefore wisely hold, as courts have always conservatively held, that whatever might have been the construction, were it *res integra*, time and the practice of the States, and the immense interests involved, in addition to the intrinsic character of the marriage relation itself, have settled the question of legislative power over it beyond the reach of judicial speculation."

The same views are clearly stated and adopted by the Court in *Learin* vs. *Sleator*, 2 Green, (Iowa,) 604.

Starr vs. *Pease*, 8 Conn., 541.
Gaines vs. *Gaines*, 9 B. Munr., 295.
Metzell's Appeal, 10 Penn. State, 449.
Griffin vs. *Griffin*, 4 Harr., (Del.,) 440.

The Supreme Court of Ohio, in *Binghan* vs. *Miller*, 17 Ohio, 448, although it denied the legislative power, yet, in view of the consequences that would result from declaring legislative divorces invalid, held that the divorce was valid. It said:

"To deny this long exercised power and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only rights of property we should not hesitate; but second marriages have been contracted and children born, and it would bastardize all these, although born under the sanction of apparent wedlock, authorized by an act of the Legislature before they were born, and in consequence of which the relation was formed which gave them birth."

These considerations were sufficient to justify and require it to hold the divorce valid.

I shall content myself with the citation of the above authorities, and claim that I have fairly established the proposition that the Territorial Legislature had the legislative power to grant a divorce in a proper case. Was that power qualified or taken away by the allegations of the complaint that the said Lydia had no notice of the proceeding, and that there was no good ground for the same, and that she never assented thereto?

The Chief Justice, in the case of *Maynard* vs. *Valentine* 2, Wash. Ter. Rep., 3, which involved the validity of this identical Maynard divorce, said:

"Must it not be *conclusively presumed* that the Legislature has done whatever was right and becoming in the premises; has made inquiry; has found fit facts on which to base its action, and has not exercised a discretion which belongs to it, and to it exclusively, except upon full information and for just cause? Could this court set as a tribunal of review to investigate and redress the acts of the Legislature in the exercise of its legislative discretion? Can we inquire into the fidelity of the legislative body to the trusts reposed in it by the people; and if, in our opinion, it was unfaithful, then pronounce its doings void? Certainly our courts are not constituted with any such functions."

Cooley Const. Lim., 134, says:

"In dissolving the relation, it proceeds upon such reasons as to it seem sufficient; and if inquiry is made into the facts of the past it is no more than is needful when any change of the law is contemplated with a view to the establishment of more salutary rules for the future. The inquiry, therefore, is not judicial in its nature, and it is not essential that there be any particular finding of misconduct or un-

fitness in the parties. As in other cases of legislative action, the reasons or motives of the Legislature cannot be inquired into. * * * * The legislative will must be regarded as sufficient reason for the rule which it promulgates."

And in *Wright* vs. *Wright*, 2 Maryland, 451, the court said:

"In the absence of all evidence to the contrary, we are to assume that the action of a co-ordinate branch of the Government has been within the limits prescribed by the constitution. If the passage of a particular act be but a 'regular exercise of legislative power,' *notice is unnecessary.* The Legislature may, *of its own motion*, without suggestion from or to any other body or person exercise the power which it is endowed by the Constitution."

And in *Cronin* vs. *Cronin*, *supra*, the court said:

"The observations already made dispose of the question of notice. The power being shown to be legislative, the judicial quality of the act is merged. Notice becomes unnecessary, because it is a law and not a decree."

See, also, *Fletcher* vs. *Peck*, 6 Cranch, 87, where the Supreme Court of the United States held that a statute of a State could not be attacked by showing that the members of the legislature acted corruptly in its passage.

3. Having shown that the Territorial Legislature had the legislative power to dissolve a marriage contract, I now proceed to inquire whether the exercise of that power was inconsistent with the Constitution or laws of the United States

I shall take for granted that the only clause in the Constitution or laws with which there is any plausible ground for contending that there is an inconsistency, is that clause, in the Constitution, forbidding any State from passing any law impairing the obligation of contracts.

Const., Art. 1, § 10.

Upon this point the authorities are overwhelmingly in favor of the proposition that the marriage contract is not one of the contracts that are contemplated in that clause of the Constitution.

While there is simply an agreement to marry, it may be said to be a contract ; but when the agreement has been executed and the marriage consummated, then it becomes a new social relation—a *status*, subject to the control of the legislature.

The Court well expressed the true doctrine in *Maynard* vs. *Valentine*, *supra*. It said :

"If the marriage contract between Maynard and appellant contained obligations such as the Constitution prohibits any State, by law, to impair, and the contract could not be set aside without impairment of those obligations, then it was one that the Legislature of Oregon never had power to annul. But we are of the opinion that the contract of marriage was not within the purview of the constitutional clause. Not but that we believe a marriage to be a contract. It certainly is a very important contract. It not only most intimately affects the married persons in their private affairs, but it changes their social and political status. It brings them into new relationships to society and to the State ; relationships which our law-givers have oftentimes recognized with favor and

distinction. It is so peculiar in its office and effect, that when ordinarily contracts are talked of, no reference is understood to be made to the contract of marriage. It is so unique that if all contracts possible were to be classified scientifically into varieties, species, genera, classes, etc., it would stand alone in the most comprehensive sub-division to which it should be assigned. Ever since the adoption of the Federal Constitution, the general current of legal opinion in this country, as evidenced by law writers, legislative enactments, and judicial decisions, is opposed to the idea that the provision against impairing the obligation of contracts had any bearing upon marriage. It is not necessary to cite from the numerous text-writers. Their opinions upon this point are well nigh unanimous. The Legislatures of the various States have, from the date of the constitution, continued to pass divorce acts, unconscious of restraint. The State courts have upheld such acts and under State statutes, creating causes of divorce, have granted divorces upon grounds, which, at the time of marriage, were not good law.

"In *Butler* vs. *Pennsylvania*, 10 How., 302, 416, the Supreme Court of the United States, through Daniel, J., says: 'The contracts designed to be protected by the 10th section of the 1st article of the Federal Constitution, are contracts by which perfect rights, certain, definite, fixed private rights of property are vested. According to this definition, property rights which are not still inchoate or imperfect, and which become vested by marriage, and only such rights, could not be constitutionally divested by dissolution of marriage. Such rights no divorce act avails or professes to divest.'

"The act divorcing Maynard from appellant did not profess to divest any such rights, nor did it accomplish any such divesture. If the rights existed it would not be necessary to maintain for the future the marriage in order to maintain the rights. Such rights are freely separable from such a contract as that of marriage, and may be preserved without pre-

serving any future marital relations between the parties.

"It is, therefore, untenable, that the act professing to snap their marriage tie is void, because impairing the obligations of a contract."

To the same effect are the following authorities:

1 Bishop, M & D., § 2, 19, 667, 669;
2 Bishop, M & D., § 199;
Cooley, Const. Lim., 134;
Maguire vs. *Maguire*, 7 Dana, 181;
Dickerson vs. *Dickerson*, 1 Yerg., 110;
Nore vs. *Ewing*, 9 Ind., 37;
Ditson vs. *Ditson*, 4 Rhode I., 87;
Starr vs. *Pease*, 8 Conn., 541;
Bertheling vs. *Johnson*, 3 B. Mun., 90;
Hull vs. *Hull*, 2 Strob. Eq. (S. C.,) 174;
Bingham vs. *Miller*, 17 Ohio, 445;
Sleaton vs. *Levin*, 2 Green (Ia.,) 604;
Cabell vs. *Cabell*, 1 Met. (Ky.,) 319;
Starr vs. *Hamilton* Deady, 268;
Tolen vs. *Tolen*, 2 Blackf., 407;
Jones vs. *Jones*, 2 Tenn., 2;
Carson vs. *Carson*, 40 Miss., 349;
Askew vs. *Dupree*, 30 Ga., 173;
Adams vs. *Palmer*, 51 Maine, 480.

This last case discusses the question of the power of the legislature to grant divorces and of the relation after marriage, whether that of contract or *status*, in such a clear and forcible manner that I shall quote extensively from the opinion which was delivered by Appleton, Chief Justice. He said:

"On the 31st day of July, 1846, by an act of the legislature of the state, Franklin Adams was divorced from Mary Adams, his wife. On the 18th of August, 1846, he was married to the demandant. The validity of this marriage depends on the constitutional authority of the Legislature to grant a divorce.

(1.) "The power of the British Parliament to grant divorces is unquestioned. The Legislature of this, and of most other States of the Union, have granted divorces in numerous instances; and, unles there are found express constitutional prohibitions, the exercise of this power for a series of years would seem to be no insignificant argument in favor of the rightfulness of such exercise. But when, as in this State, it has the weight of long continued legislative usage, sanctioned by the authority of our highest judicial tribunal, manifest and conclusive error must be shown in the conclusions to which this court arrived, to induce us to reverse a deliberately-formed opinion upon the strength of which the Legislature have based their subsequent action, and upon the faith of which parties have entered anew into marital relations.

"Notwithstanding a practice, continuing since the origin of the government, and its sanction by the opinion of this court in 16 Maine, 479, it is urged that the legislature have no constitutional authority to grant divorces; that marriage is a contract, like other contracts; that its obligations cannot be impaired without violating the clause in the Constitution of the United States prohibiting the passage of any 'law impairing the obligation of contracts;' that a divorce does impair their obligations; that the dissolution of the marriage contract is a judicial and not a legislative act; and that, consequently, the divorce of Franklin Adams from his then wife, by the act of the Legislature, before referred to, was void, and his subsequent marriage to the demandant null.

"The argument of the learned counsel assumes

that marriages are contracts like other contracts, and within the constitutional provision, just referred to, as such, for if not, this branch of the argument has no foundation upon which to rest.

"Upon examination it will be found that there are grave and important differences between marriage and other contracts. All contracts as such depend upon the mutual and concurring assent of the parties thereto. They agree upon the terms. They define the respective rights, duties and obligations of each to the other. The contract may be for a longer or shorter period of time. Its terms may be changed, modified or dissolved, as the parties may determine. If the contract be violated by the one, damages may be recovered by the other for such violation. While the contract remains in its original vigor, the rights of the parties are ever the same—their obligations ever the same.

"Their rights cannot be impaired by the Legislature. The contract is the law of the parties in reference to its subject matter, and remains unaffected by any change of d micil by the parties. Its origin, its continuance and dissolution depend upon their will.

"The contract *to marry* is like other contracts, and subject to the same law. It is a contract to enter into a given relation—a peculiar *status*. But when once the contract, *to marry*, has been performed, the original contract, antecedent to such marriage, is at an end. The parties, having complied with its terms, they cease to have rights under or by virtue of it. A new relation has been entered into, and the mere assent of the parties to enter into such relation does not thereby make such relation a contract.

"When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest, not upon their agreement, but upon the general law of tne State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract that the relation

should be established; but, being established, the power of the parties, as to their extent or duration, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, as long as it continues, are such as the law determines from time to time, and none other.

"The rights, duties and obligations arising under contracts are everywhere the same. Those of the marriage relation change with the change of domicil, and are dependent upon its laws. Foreigners do not bring, with their families, the laws relating to marriage of the place where they entered into that relation. A marriage in France and a change of domicil to England, the law of husband and wife, as established there, governs the parties so long as their residence continues—to be modified anew by a further change of domicil. In other words, the legal obligations arising from the relation of marriages vary with that of the law of the State to whose jurisdiction the parties may be amenable.

"But at any given time, the law of marriage of any State for all its inhabitants is one and the same, but it may vary as the sovereign power of the State shall determine.

"So, too, the law of divorce depends not upon that of the place, where the relation of marriage is entered into, but upon that of the place where the dissolution is sought to be obtained. The law of France would determine the causes of divorce, if sought for, while the parties were there domiciled. If they should change their domicil to America the *lex loci*, where they should establish their residence, would prescribe the causes for and on account of which a dissolution of marital relations would be decreed. Nor is this all. The causes for divorce may be changed by the legislature after marriage.

They may be increased or diminished, and a divorce will be granted according to the law on that subject, when the libel is filed or the decree made, and not as it was when the ceremony of marriage was performed. New causes for divorce may be enacted and the antecedent marriages will be dissolved for grounds subsequently deemed sufficient for its dissolution. Each State for itself is the exclusive judge of what shall be a valid cause for dissolving this relation, no matter when or where it was entered into

"Marriage, though in some respects resembling a contract, is rather to be regarded as a social relation; a *status* with duties, rights and obligations established by the law of the State where the parties have their domicil, not by that of the State where the relation is formed—much less by that of their own will and pleasure. It is not then a contract within the meaning of the clause of the Constitution, which prohibits the impairing of the obligation of contracts. It is rather a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds—but are the creation of the law itself; a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life; and the true basis of human progress. "*Tunc genus humanum primum mollescere cœpit.*"

In the light of these authorities it is clear that the legislative divorce in question did not impair the obligation of any contract, and therefore was not inconsistent with the Constitution of the United States.

4. Lastly, I shall consider what effect the legislative divorce had upon the rights of Lydia A Maynard.

It will be observed that the record shows that the husband made his settlement on the 3d of April, 1852, and was divorced on the 22d of December, 1852, a period of a little over eight months; and that the wife never either settled or resided upon the land.

At the time of the divorce the husband had not performed the conditions precedent to the vesting of the title in him.

It was so held in the case of *Maynard* vs. *Valentine*, above cited.

In that case the Chief Justice said:

"The question is this: Had the appellant, as Maynard's wife, at the time of the divorce act, any perfect right of property to the land in controversy vested in her? * * * She asserts that such a right was in her under the provisions of § 4 of the donation law. But, by that section, the donation of 'six hundred and forty acres, one-half to himself and the other half to his wife' to be held by her in her own right,' is given to that married man only who 'shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act.' It needs but little consideration of the terms of such grant to perceive that the right of the wife does not become perfect, nor vest under them, until the residence and cultivation by her husband, *as her husband*, is complete. Her husband's title is imperfect and inchoate till then, and how can her's be more?

"The statute moreover contemplates, we think, a common residence and settlement by both husband and wife. 'In all cases,' it reads, 'where such married persons have complied with the provisions of this act, so *as to entitle them to the grant as above provided*, whether under the late provisional government of Oregon, or since, and either shall have died

before patent issues, the survivor and children, or heirs of the deceased, shall be entitled,' &c.

"In an argument before us the wife claims that her domicil never was in Oregon. If this be granted, it is difficult to see how, within the spirit of this generous law, a law intended to foster and reward actual and *conjoint* settlement, she can proceed to claim even an incipient right to land under that law. Probably the law should not be held to compel wives to accept a gift. If they can refuse, what is so decisive proof of intent to refuse as a refusal to be considered partaker of the husband's domicil? Doubtless *double donations were offered to promote double settlement.* The aim was to plant and endow families in Oregon."

If this were the only authority, it is so consonant with good sense and the apparent intent of Congress, that I should have no fears whatever of this court adopting any different construction.

But it is not. The question has been forever and finally put at rest by the decision of this Court in *Hall* vs. *Russell*, 101 U. S., 503.

In that case it was expressly held that title did not vest until the four years of settlement and cultivation had expired. Chief Justice WAITE, in delivering the opinion of the court, said:

"We conclude, therefore, that under section 4, there was no grant of the land to a settler until he had qualified himself to take, as grantee, by *completing his four years of residence and cultivation*, and performing such other acts in the meantime as the statute required, in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statutory only, and cannot be extended beyond the just interpretation of

the language Congress has used to make known its will."

In *Vance* vs. *Burbank*, *Do.*, 521, the Chief Justice, as if to make certain exactly what had been held in *Hall* vs. *Russell*, said:

"In *Hall* vs. *Russell*, (*supra*, p. 503), we held that a grant to a settler did not take effect as against the United States, so as to pass anything more than a possessory right in the lands occupied, until the completition of the four years' residence and cultivation, and a full compliance with all the other conditions of the act."

In *Vance* vs. *Burbank*, it was also held that the wife takes nothing under the donation act, except through her husband, and that, if his right were for any reason defective, hers must necessarily be also.

Chief-Justice Waite, in delivering the opinion of the Court, said:

"The wife could not be a settler. She got nothing except through her husband. If he abanoned the possession before he became entitled to the grant, her estate in the land was gone as well as his. * * * His acts affecting the claim are her acts. His abandonment, her abandonment. His neglect, her neglect. As her heirs must claim through her, whatever would bar her would necessarily bar them."

It was a fact in this case that the wife lived with her husband on the land, but died before the period of settlement and cultivation had expired. Her heirs sought to recover her share. The Land Department had decided against her husband. The Supreme Court held that decision to be a final decision.

That case did not present the question which might be made in this, that the wife never having been on the land with her husband, could have no claim.

It would seem to have been the intention of the law to encourage the increase of population in this then new and unsettled country, and for that purpose to have held out strong inducements to enter into and keep up the marital relation. A wife living in Pennsylvania, and never being in Oregon, was not, in my opinion, the kind of wife that this legislation contemplated. That was the view that the supreme court of the Territory took in *Maynard* vs. *Valentine.*

The Chief-Justice said: "*Doubtless double donations were offered to promote double settlement. The aim was to plant and endow families in Oregon.*"

But, be that as it may, it is perfectly clear that at the date of this divorce the husband had no vested right. His wife, therefore, had none, upon the principle determined in *Vance* vs. *Burbank.*

She could acquire no additional rights after the divorce, because by the divorce she ceased to be his wife, and after the *vinculum* was broken all rights contingent upon it were gone. No rights were saved except those *actually vested.*

This is settled law.

"Divorce puts an end to all rights depending upon the marriage *not actually vested.*"
Bishop Marriage and Divorce, § 660.

"The legislature, therefore, cannot, in its divorce act, divest the husband of vested rights of property

and bestow them upon the wife. It cannot give the wife alimony or anything in the way of alimony out of the estate of the husband. But, as it snaps the *vinculum* of the marriage, whatever hangs upon it falls."

Ditto, § 798.

"Those rights of property which depend upon the continued existence of the relation will be terminated by the dissolution."

Cooley's Const. Lim., 114;
Star vs. *Pease*, 8 Conn., 541;
Lewis vs. *Sleaton*, 2 Greene, (Ia.,) 604;
Townsend vs. *Griffin*, 4 Harrington, 440;
Legg vs. *Legg*, 8 Mass., 99;
Barber vs. *Root*, 10 Mass., 260;
Renwick vs. *Renwick*, 10 Paige, 424.

This doctrine has been affirmed by this court. In *Barrett* vs. *Fielding*, 111 U. S., 524, Mr. Justice GRAY, in delivering the opining of the Court said:

"Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to any right which either has acquired by marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the Legislature, orders property to be transferred, or alimony to be paid by one party to the other * * * and the order operates *in personam*, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated."

This case has involved a consideration of the power of a legislature to grant a divorce. It is clear that such power exists. Whether it is expedient to exercise it, is a question for the law-makers to consider.

In former days the practice prevailed almost universally. Of late it has gone into disuse. Nearly all of the States have provided, either by constitutional provisions or statutory enactments, that the Courts alone shall have the power to dissolve the marriage relation. This is doubtless the wisest rule. It gives to each party the right to have notice, and to appear and defend his interests in person or by counsel. It is one evidence of the progress which has characterized the present century. In the arts, in science, everywhere, there has been improvement. Steam, air, electricity, have been made to contribute to the convenience and comfort of man. Why not concede that like improvement has taken place in the administration of the law, relating to the most endearing of all relations—the marital relation? It does not follow that the old ways were illegal because something better has been found and adopted. It proves only that the march of mind is onward, and that the great legal heart of the country throbs and beats in unison with the advancement of its material interests.

I submit that the law of the case is with the defendants, and that the judgment of the court below should be affirmed

WALTER H. SMITH,
Attorney for Appellees.